

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

THE HONORABLE ANDREW S. HANEN, JUDGE PRESIDING

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UNITED STATES OF AMERICA, ) No. 4:22-cr-612  
)  
Plaintiff, )  
)  
vs. )  
)  
EDWARD CONSTANTINESCU, )  
et al., )  
)  
Defendants. )  
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**PRETRIAL CONFERENCE - DAY 2**

**OFFICIAL COURT REPORTER'S CERTIFIED TRANSCRIPT**

**Houston, Texas**

**March 20, 2024**  
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APPEARANCES:

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3                         United States District Court  
4                         Southern District of Texas  
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6                         **Proceedings recorded by mechanical stenography.**  
7                         **Transcript produced by Reporter on computer.**  
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# PROCEEDINGS

(The following proceedings held in open court.)

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THE COURT: All right. Be seated. Okay.

I want to start on exhibits.

Before I do that, it was requested, I think by the defendants, that I provide at least my thinking of what a charge would look like, and I'll probably have that for you tonight. I'm not bound by anything I'm giving you, but it's my -- it will be my version -- I've looked at both what the government has submitted and the defendants have submitted request-wise and incorporated large portions of both.

But, anyway, you asked for it. I will give it to you. Obviously, when I was doing the charge, it was probably obvious from yesterday's hearing, it was one of the things that got me reinterested in the motion to dismiss filed by Mr. Rybarczyk after having looked at the charge, and I'm still interested in that. But I will give you that, hopefully, before you go home today; and if not, we'll get it to you tomorrow.

10:04:25 1 All right. I would like to start with the  
10:04:31 2 government's exhibits. And I'm just going to go right  
10:04:36 3 down the line and see where we have objections and see  
10:04:42 4 where we don't.

10:04:46 5 I have my list of the government's  
10:04:49 6 exhibits, basically has 340 exhibits.

10:05:22 7 Government's 1, I think we've talked  
10:05:26 8 about. And I'm admitting Government's 1 subject to  
10:05:32 9 the objections I sustained yesterday. You know, no  
10:05:41 10 SEC most wanted, no hand gestures to the camera. But  
10:05:49 11 other than that, it's admitted.

10:05:52 12 MS. CORDOVA: Your Honor?

10:05:54 13 THE COURT: Yes.

10:05:55 14 MS. CORDOVA: On Government Exhibit 1,  
10:05:56 15 there is a post from Dan Knight, who is a government  
10:06:01 16 witness. He will not be a defendant in this case.  
10:06:03 17 And he posted --

10:06:04 18 THE COURT: He is a defendant in this  
10:06:06 19 case.

10:06:06 20 MS. CORDOVA: But he won't be a defendant  
10:06:08 21 in front of the jury.

10:06:11 22 THE COURT: He won't be?

10:06:13 23 MS. CORDOVA: No, he's pleaded guilty.

10:06:15 24 THE COURT: Oh, I understand that. We  
10:06:16 25 don't expect Mr. Knight to testify?

10:06:18 1 MS. CORDOVA: He will be testifying.

10:06:20 2 THE COURT: Okay.

10:06:21 3 MS. CORDOVA: Yes, Your Honor. Sorry that  
10:06:22 4 wasn't clear.

10:06:24 5 The posted issue -- and I just want to be  
10:06:27 6 clear that this is covered under the Court's ruling.  
10:06:29 7 He took a selfie of himself with Mr. Hennessey and  
10:06:33 8 Mr. Matlock behind him and posted it apparently on  
10:06:36 9 Twitter with the -- with the language "pumpers,"  
10:06:40 10 that's it, just "pumpers." There's no evidence that  
10:06:44 11 Mr. Hennessey ever saw it, that Mr. Hennessey liked  
10:06:47 12 it, that Mr. Hennessey approved it.

10:06:49 13 THE COURT: I'll sustain that.

10:06:50 14 MS. CORDOVA: Thank you.

10:06:51 15 THE COURT: Take out the word "pumper."

10:07:03 16 All right. Now, on page 1 of the  
10:07:03 17 government's exhibits, then the next exhibits start  
10:07:06 18 with 2A and they go through 5B.

10:07:07 19 Are there any objections to any of those?

10:07:09 20 MR. FORD: Yes, Your Honor. We'll start  
10:07:20 21 with the series 2 exhibits, which refer to Onconova  
10:07:26 22 Therapeutics, ONTX, between July 16th and August 26th  
10:07:31 23 of 2020. That is a substantive count against --  
10:07:35 24 charged against my client, Mr. Constantinescu. We are  
10:07:38 25 having some technical difficulties.

10:07:41 1 The first question is whether we've gotten  
10:07:42 2 those resolved.

10:08:01 3 Sounds like we've got it working. So  
10:08:03 4 while we get that situated --

10:08:04 5 THE COURT: If you want me to look at  
10:08:06 6 something, it's not working up here.

10:08:10 7 MR. FORD: Do we have paper copies of the  
10:08:12 8 exhibits?

10:08:14 9 THE COURT: We can get them, I guess.

10:08:56 10 What are we looking at, Mr. Ford?

10:08:58 11 MR. FORD: Exhibit 2A.

10:09:00 12 THE COURT: Okay.

10:09:02 13 MR. FORD: It purports to be a chart of  
10:09:07 14 trading price and volume of ONTX. So we have multiple  
10:09:17 15 issues with this. One is we don't know who created  
10:09:19 16 it. There is an authenticity issue.

10:09:23 17 The other sort of concern with this series  
10:09:25 18 of exhibits, the government just appears to have  
10:09:34 19 chopped a section of trading to support their  
10:09:40 20 ambiguous causation correlation theory that they plan  
10:09:43 21 to present to the jury, while claiming they're not  
10:09:46 22 going to present it.

10:09:47 23 The only function of this chart would be  
10:09:49 24 to suggest that the stock went up and down and the  
10:09:51 25 defendants were somehow the cause of it.

10:09:55 1 This is an ongoing violation of *Brady v.*  
10:10:00 2 *Maryland* under the United States Constitution. We  
10:10:02 3 have strong reason to believe that the government has  
10:10:05 4 in their possession documents that suggest that to the  
10:10:09 5 extent the price was artificially inflated or that it  
10:10:13 6 dropped on August 24th, it was not caused by any of  
10:10:16 7 the individuals in this room, but other easily  
10:10:20 8 identifiable individuals.

10:10:21 9 And they have failed to produce that  
10:10:26 10 *Brady*, but as far as the functional objection, we'll  
10:10:29 11 pull up to show our Defendant's Exhibit 1102, which we  
10:10:36 12 will seek to have admitted. It's an actual chart that  
10:10:42 13 was not created in the ordinary course of business.  
10:10:45 14 We obtained it off Yahoo! Finance. It's easily  
10:10:48 15 authenticated and admissible.

10:10:51 16 You can see that this stock, like every  
10:10:53 17 other stock in the stock market, goes up and down over  
10:10:57 18 time. If we zoomed out even further, you just -- the  
10:11:00 19 stock goes up and down.

10:11:01 20 And so what they've done is they've  
10:11:04 21 chopped out a section to make it appear as if the  
10:11:08 22 stock went up and down on this individual occasion,  
10:11:11 23 and that was caused somehow by the tweeting of my  
10:11:14 24 client.

10:11:17 25 We can pull up his trade records as well.

10:11:23 1 We've filtered the Excel spreadsheet. You can see  
10:11:27 2 that as early as March 19, 2020, that's as far back as  
10:11:35 3 the records go that the government provided us, but I  
10:11:37 4 have reason to believe that my client traded ONTX  
10:11:40 5 stock long before March 7th, 2019.

10:11:41 6 You can see he was trading it in 2019.  
10:11:44 7 We'll scroll down. He continued -- he traded it all  
10:11:45 8 through 2019, through the entire year. Continued to  
10:11:50 9 trade it through January of 2020. And then you can  
10:11:52 10 see right there that he also traded it --

10:11:56 11 THE COURT: Well, let me get back to  
10:11:58 12 actual objections, and the fact you disagree with the  
10:12:04 13 exhibit or you think it's prejudicial is not an  
10:12:06 14 objection to admissibility. I mean, quite frankly,  
10:12:11 15 there shouldn't be any exhibit that doesn't prejudice  
10:12:14 16 one side or the other, or they wouldn't be relevant.

10:12:20 17 Now, the authenticity -- easy for me to  
10:12:26 18 say -- whether it can be authenticated or not is a  
10:12:30 19 different question.

10:12:33 20 Who's going to answer that for the  
10:12:34 21 government?

10:12:35 22 MR. FORD: So -- and, Your Honor, just to  
10:12:36 23 be clear, we are objecting on authenticity grounds  
10:12:40 24 because we don't know who made this chart, and it's  
10:12:45 25 testimonial in nature.



MR. LIOLOS: Good morning, Judge. John Liolos for the United States.

So Mr. Melley made these charts. We've disclosed that to Mr. Ford. He made them from Bloomberg data of the price and volume of the stocks at issue that he got from Bloomberg. This is a 1006 summary chart summarizing that voluminous data.

They can cross-examine Mr. Melley on all his charts. It provides critical context. It's around the trading window. And another thing that it provides is context for the price targets the defendants are constantly shouting out. And it shows that, within these windows, the price more often than not comes nowhere near the targets they're talking about.

THE COURT: If Mr. Melley gets up and testifies to that, Mr. Ford, do you still have an objection?

MR. FORD: Not to authenticity, no.

THE COURT: Okay. Well, we're going to defer on Number 1 till Mr. Melley testifies. I mean, number 2A, I'm sorry.

MS. CORDOVA: Your Honor, we would also object on relevance grounds on the basis that it's just irrelevant what happened to the price. Because

1 they haven't alleged that our clients were responsible  
2 for a pump and dump, but they're trying to show it  
3 through this chart.

4 THE COURT: What relevance do we have  
5 here?

6 MR. LIOLOS: Well, first of all, Your  
7 Honor was talking yesterday about the context.  
8 They're not just trading in the ether. The jury needs  
9 some sort of context for what the stock was doing in  
10 the trading window that all the trading that was  
11 happening is -- we're talking about.

12 And, secondly, specifically to the price  
13 targets, I think it's highly relevant to the  
14 reasonableness of the price targets that they're  
15 touting.

16 THE COURT: You guys know the facts. Tell  
17 me, what dates are we interested in in this chart? We  
18 have a two-month chart.

19 MR. FORD: So Mr. Constantinescu first  
20 purchased the stock July 16, 2020. He then held the  
21 stock for two weeks. He sold a portion of his  
22 position on July 29th, two weeks later. He had closed  
23 out his position on August 14th, 2020. You can see  
24 the stock was flat during that time.

25 And then on August 24, Mr. Constantinescu

1 purchased and sold approximately 60,000 shares of ONTX  
2 stock. You will see that the trading volume of the  
3 24th was over 180 million shares. That means 180  
4 million buy and sell orders. The notion that the  
5 buying and selling of 60,000 shares could have  
6 impacted the stock price is absurd.

7 And what we believe Mr. Melley plans to do  
8 on the stand is suggest that this was a pump and dump  
9 and that somehow my client's selling of 60,000 shares  
10 would have influenced the price, when 180 million  
11 shares sold that day. Just to be clear, it's  
12 180 million over a six and a half hour trading day.

13 There's more than 60,000 shares there for  
14 probably trading every minute. It's impossible or  
15 inconceivable that his actions affected the stock  
16 price.

17 So we are concerned because we understand  
18 what they're going to do with this chart is they're  
19 going to put it in front of Mr. Melley and say, look,  
20 this is a pump and dump. The stock went up and down,  
21 and he bought it and sold it on these dates.

22 It is not a realistic or feasible  
23 causation argument, and we have a fear that it will be  
24 presented to the jury in that way.

25 MR. LIOLOS: Mr. Melley is not going to

1 talk about any of the defendants' trading  
2 specifically. He's just giving context to the trading  
3 in the stock during and around the window.

4 THE COURT: Well, I think most of your  
5 arguments go to the, you know, cross-examination and  
6 the merits. It's not whether it's coming in or not.

7 MR. MURTHA: If I can add in, Your Honor.  
8 Mr. Murtha on behalf of Mr. Hennessey.

9 The chart also goes beyond the period that  
10 the government has charged in the episode. So  
11 Government Exhibit 2B has a date frame from July 16,  
12 2020, to August 26, 2020. But Government's Exhibit 2A  
13 expands that episode, outside of what they chose, to  
14 July 1st, 2020, to August 31st, 2020. So the chart  
15 should at least be limited down to what they've  
16 actually alleged to include the time frame for the  
17 allegedly fraudulent statements. They're trying to  
18 have it both ways.

19 MR. LIOLLOS: Your Honor, we're going to be  
20 arguing about the reasonableness of the price targets  
21 that they're saying. And they're going to be pointing  
22 out, well, it could have gone up. It could have hit  
23 that. And these show even, you know, a week or two  
24 outside the --

25 THE COURT: I think that goes to

10:17:32 1 cross-examination, not to admissibility. And if  
10:17:43 2 that's -- I mean, are these going to be the objections  
10:17:45 3 to -- do I have a series of these?

10:17:46 4 MR. LIOLOS: Yes, Your Honor.

10:17:48 5 MR. FORD: Your Honor, just to be clear,  
10:17:51 6 to the extent you're willing to admit them, we don't  
10:17:54 7 need to spend all day on this. And it is going to  
10:17:56 8 appear as 2A, 3A, 4A throughout. So that -- you know,  
10:18:00 9 that's why we're raising it now as we are. We'll get  
10:18:04 10 a decision and then we'll move on. It's going to  
10:18:07 11 cover, you know, 50 so exhibits.

10:18:10 12 THE COURT: Okay.

10:18:10 13 MS. EPLEY: If I may briefly.

10:18:11 14 If you're about to make a ruling in  
10:18:13 15 regards to the stock A charts comprehensively, what I  
10:18:13 16 would also point out to the Court -- stock A charts,  
10:18:23 17 so 2A, 3A through 20A and further.

10:18:27 18 In this scenario, the government has  
10:18:30 19 provided a broader window than the trading window, as  
10:18:32 20 you've already been told. But in other examples they  
10:18:35 21 provide clipped windows. So even less than the  
10:18:37 22 trading window as they established it. Because it  
10:18:40 23 fits a narrative or an optic that suits them.

10:18:44 24 And so as you make this ruling, I would  
10:18:46 25 ask that all stocks at least include the full trading

10:18:48 1 window as prescribed by the government.

10:18:51 2 THE COURT: Okay. Mr. Ford, did you have  
10:18:54 3 something you wanted to add? I'm sorry.  
10:18:59 4 Mr. Williams.

10:18:59 5 MR. WILLIAMS: Williams.

10:19:02 6 THE COURT: Williams.

10:19:04 7 MR. WILLIAMS: The only thing I was going  
10:19:05 8 to point out was to answer your question about whether  
10:19:08 9 you were going to be doing a lot of these -- the only  
10:19:12 10 thing I was going to point out was to answer your  
10:19:14 11 question about whether you were going to be dealing  
10:19:15 12 with a lot of these. Essentially, the A exhibit, 2A  
10:19:20 13 through at least 30-some-odd A --

10:19:28 14 MR. LIOLOS: 37, I think?

10:19:30 15 MR. WILLIAMS: 37A. These are  
10:19:30 16 characterized as FINRA price volume charts. So 37  
10:19:34 17 times, Your Honor, at least to answer your question,  
10:19:35 18 and it's usually the A exhibit in the government's  
10:19:39 19 exhibit protocol.

10:19:41 20 THE COURT: Okay. All right. Well, I am  
10:19:44 21 certainly allowing y'all to cross-examine whoever the  
10:19:47 22 government's witness on, you know, why he did one  
10:19:51 23 chart that's a month long and why he did one chart  
10:19:54 24 that's two months long or three months long. I mean,  
10:19:57 25 I think you can do that, but I'm not sustaining the

objections because of that.

So we're assuming Mr. Melley can authenticate all of these. I'm going to admit all of these, and overrule those objections.

MR. LIOLOS: Thank you, Judge. And I did just want to make clear for the record as to Mr. Ford's *Brady* point. These are all within, you know, charts of the trading episodes to which we made the *Brady* request to the SEC and FINRA.

THE COURT: Okay. All right. Does that take me all the way to 38?

MR. FORD: So there's a series. With regards to 2B, it's the charts of Garibotti. We obviously renew all of our objections that were raised yesterday with regards to those charts, including the fact that they summarize something other than what they purport to summarize.

Issues with the color coding, the labeling of falsity, all those sort of things, and that's going to appear on Exhibit 2B throughout, we would request that we defer the determination about preadmission until the government has revised these charts to comply with the Court's rulings yesterday.

THE COURT: Okay. Help me here. Which -- which exhibits are we talking about?

MR. FORD: So go to -- if you go --

THE COURT: No, I understand the color coding and I ruled on that yesterday. We're not having any commentary. We're not have any color coding that indicates false or not false. I mean, those are --

MR. FORD: They put them as Exhibit 2B, 3B, 4B, 5B, et cetera. And so we're pulling one up just as an example. This is 2B.

Because the government is going to be making modifications, we would just request that we defer preadmission until they've made the modifications to the extent Your Honor has ruled that these are admissible. Once we've reviewed the modifications to make sure they comply with Your Honor's suggestions, then we will, you know -- that will be that.

THE COURT: All right. Let's try to get -- Mr. Armstrong, you and Mr. Liolos, let's try to get these revised charts to them ASAP.

MR. ARMSTRONG: Your Honor, the bigger issue is the admissibility of documents themselves. Are they proper summaries? Which we contend they are. Do they properly summarize the defendants' misstatements? Which we contend that they do.



10:22:48 1 So those are the bigger issues that need  
10:22:49 2 to be resolved. We can resolve the minor nits here  
10:22:52 3 and there about the actual content.

10:22:54 4 THE COURT: I've not heard an objection to  
10:22:55 5 the content other than the prejudicial content that I  
10:23:01 6 thought was sustainable.

10:23:04 7 MR. FORD: Your Honor, the only other  
10:23:06 8 thing from our perspective, and I'll let everybody  
10:23:11 9 else talk, is there is data that this purports to  
10:23:15 10 summarize. Those include the actual trade records,  
10:23:19 11 the actual tweets or conversations. We would just  
10:23:22 12 request that, to the extent this is going to be  
10:23:25 13 authenticated and pre-admitted, that all of the  
10:23:27 14 underlying data is authenticated and pre-admitted as  
10:23:30 15 well. In other words, I would like to be able to use  
10:23:33 16 his actual trade records on cross.

10:23:37 17 THE COURT: Yes, I'm assuming that.

10:23:40 18 MR. FORD: Thank you.

10:23:43 19 THE COURT: Mr. Ford, remind me of that,  
10:23:45 20 though, when we get there.

10:23:46 21 MR. ROSEN: The main objection -- we're  
10:23:49 22 not going to go back to the color coding -- was just I  
10:23:52 23 don't know if Your Honor gave a ruling on the profits  
10:23:54 24 issue about the relevancy of their -- they've  
10:23:57 25 calculated total profits from trading in that time

10:24:01 1 period. But they have -- what they haven't done is  
10:24:03 2 narrow that to any profits derived from the alleged  
10:24:07 3 fraud.

10:24:08 4 And for us, that's obviously extremely  
10:24:10 5 problematic, just because it juices the numbers up  
10:24:14 6 extremely substantially. We obviously don't believe  
10:24:15 7 that there is any fraud, but it also prevents us from  
10:24:20 8 sort of cross-examining as to what any impact the  
10:24:23 9 trading had on any of the markets, as well as the  
10:24:25 10 tweeting. And also to determine for purpose of  
10:24:28 11 Rule 29 --

10:24:29 12 THE COURT: Show me an example.

10:24:31 13 MR. ROSEN: Okay. The first page of 2B,  
10:24:34 14 the very cover page.

10:24:38 15 THE COURT: Okay.

10:24:39 16 MR. ROSEN: So if you look up at the 1, 2,  
10:24:42 17 3, 4, 5, 6, 7 columns, so it goes, you know, name,  
10:24:50 18 Twitter handle, Discord handle, Twitter posts, Discord  
10:24:54 19 posts, number of shares bought, number of shares sold.  
10:24:56 20 Generally no objection beyond yesterday.

10:24:59 21 We're talking about the last column, the  
10:25:04 22 profit. It says, first in, first out. Now, the  
10:25:08 23 numbers there, the government -- I don't think there's  
10:25:11 24 any dispute on this. They're not numbers indicating  
10:25:15 25 what the government believes are fraudulent proceeds

10:25:18 1 at all.

10:25:20 2 They're total trading profits during the  
10:25:23 3 arbitrarily chosen episode dates. So we're on trial  
10:25:27 4 for securities fraud. The numbers are not proceeds of  
10:25:33 5 securities fraud. There is no relation between the  
10:25:36 6 profits that they've chosen and what we're actually on  
10:25:39 7 trial for. So it's a pure relevancy objection. It's  
10:25:43 8 extreme prejudice, because it makes it appear -- this  
10:25:46 9 example, you know, my clients actually lost money.  
10:25:49 10 So, you know, that's fine.

10:25:50 11 But Mr. Constantinescu had, you know, made  
10:25:53 12 \$300,000, but not from fraud. And that's the problem.  
10:25:57 13 It makes it appear that it's fraud proceeds.

10:26:05 14 The government's really main response to  
10:26:07 15 that is that it goes to show motive. But the two  
10:26:09 16 cases they cite are cases where it says profits from  
10:26:12 17 the crime, wire fraud, money laundering, go to motive.  
10:26:16 18 Of course they do.

10:26:17 19 But profits from general trading, which  
10:26:19 20 are unconnected to fraud, certainly don't go to  
10:26:22 21 motive. If anything, the motive is not to commit a  
10:26:25 22 crime because you're gaining money legally.

10:26:27 23 So I would have no objection if they  
10:26:30 24 narrowed it down to fraud proceeds, but general  
10:26:33 25 trading proceeds are irrelevant and it's highly

10:26:36 1 prejudicial.

10:26:39 2 THE COURT: Who wants to respond to that  
10:26:41 3 for the government?

10:26:41 4 MR. FORD: Just to be clear, none of my  
10:26:43 5 clients' proceeds were fraud proceeds.

10:26:50 6 MR. ARMSTRONG: So, Your Honor, the  
10:26:51 7 methodology for these charts is clear. All of these  
10:26:54 8 arguments just go to the weight. As we explained to  
10:26:57 9 Your Honor yesterday, the way the scheme worked was  
10:27:00 10 that they would all coordinate.

10:27:02 11 If you can go to page 2, please, Ms. Kim.

10:27:04 12 THE COURT: What is the relevance of the  
10:27:09 13 profit, though, that's not tied to the fraud?

10:27:12 14 MR. ARMSTRONG: Well, Your Honor, our  
10:27:12 15 position is that once they established this plan  
10:27:16 16 during this window, that the trading profits during  
10:27:20 17 this window are part and parcel of the scheme.  
10:27:24 18 Because they all start talking about what they're  
10:27:26 19 going to do. They all start front loading it, and  
10:27:28 20 then they put the plan into action with the false  
10:27:31 21 statements.

10:27:31 22 Now, that's just the methodology. They  
10:27:34 23 can cross-examine -- they can cross-examine  
10:27:37 24 Ms. Garibotti, like, you know, are you alleging fraud  
10:27:42 25 as to every single trade in here? And I don't know

10:27:43 1 what her answer would be. That's probably an improper  
10:27:48 2 question. It would be improper for us to say -- it  
10:27:49 3 would be equally improper for us to say to  
10:27:51 4 Ms. Garibotti, like, what are the fraud proceeds here,  
10:27:52 5 right?

10:27:53 6 And so the methodology is just the  
10:27:54 7 bookends, the windows during the relevant time periods  
10:27:56 8 of trading and the relevant time periods of the  
10:27:59 9 posting of the messages, and that's it. It's going to  
10:28:02 10 be a vanilla presentation.

10:28:07 11 MR. ROSEN: I haven't heard anything about  
10:28:08 12 really relevancy into the question of how it proves  
10:28:13 13 anything about the actual schemes that are being  
10:28:16 14 charged. There's one example we attached to our  
10:28:18 15 motion in limine, Your Honor, where my client had  
10:28:20 16 bought and effectively sold out almost his entire  
10:28:24 17 position before anyone tweeted. Out of \$59,000 in  
10:28:30 18 profit, he had gained \$50,000 in profit before any  
10:28:32 19 fraud could have possibly taken place. He did sell --  
10:28:35 20 he did gain \$9,000 after a tweet, but even the  
10:28:38 21 government with their exhibits no -- there was no  
10:28:41 22 fraud in that particular tweet.

10:28:44 23 So yet he's tagged in the cover page,  
10:28:46 24 which is what the jury is going to focus on, he made  
10:28:48 25 \$60,000 trading in one day. How do we un-ring that

10:28:52 1 bell? How do we differentiate? And how do we  
10:28:57 2 cross-examine the -- Mrs. Garibotti as to what  
10:28:58 3 actually came from fraud, what's proceeds of the  
10:29:00 4 scheme or not.

10:29:02 5 They haven't -- the government's set forth  
10:29:02 6 no evidence that simply chattering amongst their  
10:29:05 7 selves is some type of criminal act or coordinating on  
10:29:09 8 what to buy is a criminal act. And that's our  
10:29:11 9 problem.

10:29:11 10 It's so prejudicial, these numbers. Some  
10:29:13 11 of them are eye-popping numbers. The jury is going to  
10:29:16 12 be -- all they're going to do is see that cover page  
10:29:19 13 and then, boom. And, you know, it's a 403 objection,  
10:29:21 14 a 401 objection, obviously.

10:29:23 15 They can rework these numbers to make  
10:29:26 16 them, you know, relevant to the case. We've asked  
10:29:28 17 them that for a long time. And here we are. But this  
10:29:31 18 is -- I mean, this is really problematic for us.

10:29:34 19 MR. ARMSTRONG: Your Honor, we're going to  
10:29:34 20 have testimony from co-conspirators explaining why  
10:29:37 21 sales were made before the tweets. This is going to  
10:29:41 22 be an issue that is foundational to part of the case  
10:29:43 23 and how people got in and out before the tweet was  
10:29:47 24 even released. And that was common for them to do  
10:29:49 25 that, because they knew that other people just buying

10:29:52 1 the shares themselves was part of it.

10:29:55 2 And you can't, say, excise part of the  
10:29:57 3 scheme. You can't just excise part 1 of the fraud  
10:30:00 4 scheme, the front load, and then run it from the price  
10:30:04 5 before the tweet from the case. That's like excising  
10:30:09 6 a relevant period of time and the relevant conduct for  
10:30:13 7 that episode in that window.

10:30:19 8 MR. ROSEN: We just had a whole discussion  
10:30:20 9 yesterday --

10:30:20 10 THE COURT: That's not what he's  
10:30:22 11 complaining about. And I've already said I'm going to  
10:30:24 12 let in the charts that, you know, start before and  
10:30:28 13 start after. But what he's complaining about is the  
10:30:34 14 profit figure. And basically he's making a 403  
10:30:37 15 argument that the profit figure is -- one, it's not  
10:30:40 16 accurate; but whether it's accurate or not, it's not  
10:30:45 17 connected to the fraud.

10:30:47 18 And then -- and that is going to leave the  
10:30:55 19 wrong impression with the jury. Its relevance is  
10:30:58 20 outweighed by, you know, the danger it has of being  
10:31:04 21 traipsed in front of the jury.

10:31:09 22 MR. ROSEN: I mean, we just had a whole  
10:31:11 23 conversation yesterday about -- not to beat this to a  
10:31:15 24 horse, but a whole conversation yesterday about how if  
10:31:15 25 they weren't -- there's no problem with the trading.

10:31:16 1 If they weren't tweeting, we wouldn't be in this  
10:31:19 2 predicament here.

10:31:22 3 And so how can we then say, well, the  
10:31:23 4 profits from prior to that tweet is fired off are  
10:31:26 5 problematic? I mean, there's just nothing wrong with  
10:31:29 6 them get -- you know, trading ideas on what to do.  
10:31:33 7 The issue is the tweeting, the false statements and  
10:31:35 8 misreps. And including a single dollar from before  
10:31:40 9 that period, my client's, like, 50,000 out of \$59,000  
10:31:45 10 is prior to a single tweet being set off. It's so  
10:31:49 11 prejudicial and it's completely irrelevant.

10:31:52 12 MR. ARMSTRONG: Judge, that  
10:31:53 13 cross-examination could happen in 30 seconds. They  
10:31:56 14 could say, Ms. Garibotti, you see here in this chart  
10:31:58 15 that Mr. Rybarczyk bought and sold before the tweet.  
10:32:01 16 Right? Right. And he profited \$40,000 from that.  
10:32:07 17 Right? Right. So hypothetically that can be carved  
10:32:10 18 out of page 1? Right? Right.

10:32:12 19 That goes to the weight. And we're not  
10:32:14 20 going to be arguing, like, this extreme prejudice that  
10:32:17 21 they're claiming about. We're just putting the  
10:32:20 22 methodology in front of the jury saying this is what  
10:32:22 23 we did. Here is the work that we did, and we're going  
10:32:24 24 to explain why we did it, and both sides can argue it.

10:32:28 25 MR. ROSEN: You still have to satisfy 401



10:32:30 1 and 403. That's not how it works. You don't just get  
10:32:33 2 to put in anything you want and then say we get to  
10:32:36 3 cross-examine it. If those charts are coming back to  
10:32:38 4 the jury under.

10:32:38 5 1006, they have to be accurate and they  
10:32:41 6 have to be relevant to the issues at stake in the  
10:32:43 7 trial.

10:32:45 8 THE COURT: I'm sustaining the objection  
10:32:47 9 to the profit column. The rest of the chart I'm going  
10:32:52 10 to admit.

10:32:56 11 MS. CORDOVA: Your Honor, may we be heard  
10:33:00 12 on this? And this will relate to all of the Bs.

10:33:02 13 We raised this in our motion for  
10:33:07 14 sanctions. And the issue with these charts is that  
10:33:09 15 the government is trying to use these charts to  
10:33:11 16 preclude the real evidence from the jury and instead  
10:33:15 17 put in front of the jury purported tweets of my client  
10:33:20 18 that do not contain exculpatory information that was  
10:33:24 19 included in the original tweets.

10:33:26 20 So this is --

10:33:28 21 THE COURT: I'm not with you on that.

10:33:30 22 MS. CORDOVA: Okay. So you disagree with  
10:33:34 23 me or you --

10:33:35 24 THE COURT: I don't understand you.

10:33:36 25 MS. CORDOVA: Okay. Let me back up, then.

10:33:37 1 So we included on page 8 of our motion for  
10:33:42 2 sanctions -- and I can hand this back if it's helpful.  
10:33:46 3 This is just an example, and this example relates to  
10:33:50 4 Government Exhibit 10B. But it's the same principle  
10:33:53 5 that relates to all of the B charts, so it also  
10:33:57 6 relates to 2B.

10:33:59 7 And what the government has done is to  
10:34:01 8 create these charts. They gave Ms. Garibotti  
10:34:04 9 essentially a database. I know it's tiny. Sorry.

10:34:10 10 THE COURT: I hope you have bigger copies  
10:34:11 11 for jurors. There's no way they can read any of  
10:34:14 12 these.

10:34:16 13 MS. CORDOVA: So what we included there is  
10:34:17 14 an example of what the government listed as  
10:34:20 15 Mr. Hennessey's tweets in the Excel spreadsheet  
10:34:23 16 format. And then we included the actual tweets. And  
10:34:25 17 there's two very important parts of the actual tweet  
10:34:29 18 that are not included in these summary charts.

10:34:32 19 First is Mr. Hennessey's bio statement.  
10:34:37 20 It's him telling everybody who is looking at his  
10:34:40 21 tweets who he is and what he's doing. And he says,  
10:34:43 22 I'm a trader. I think that one says he's 20-ish, or  
10:34:46 23 21 or something. Young kid. He's in college. And I  
10:34:49 24 actively trade positions. I could be buying or  
10:34:52 25 selling any stock mentioned at any time.

10:34:55 1 That's part of his bio. It's not a  
10:34:56 2 disclaimer. It's not some small print. I know it's  
10:34:59 3 small print there, but on Twitter, it's part of his  
10:35:01 4 bio. It's just a few words. It's who he is. He's  
10:35:05 5 telling the world who he is and what he's doing.

10:35:12 6 THE COURT: And he's got that on the top  
10:35:13 7 or a part of every tweet he sends out?

10:35:16 8 MS. CORDOVA: It is part of his bio.

10:35:17 9 THE COURT: I didn't ask you that.

10:35:19 10 MS. CORDOVA: So it depends on how you  
10:35:20 11 view it. So if you view --

10:35:23 12 THE COURT: Answer my question.

10:35:25 13 MS. CORDOVA: I'm trying to, Your Honor.  
10:35:26 14 There are different -- if you view Twitter on a  
10:35:29 15 desktop, so on a computer, the bio will show up. Now  
10:35:32 16 it shows up on the right-hand side. At this time, it  
10:35:35 17 showed up where it shows up there on the left-hand  
10:35:37 18 side.

10:35:37 19 But now if you look at it, Twitter has  
10:35:39 20 changed their format. The bio will show up every  
10:35:42 21 single time right next to the tweet if you're viewing  
10:35:44 22 it on the desktop.

10:35:46 23 If you're viewing it on your phone, it  
10:35:49 24 will depend on how you have your settings. It also  
10:35:52 25 depends on whether you're following the person or

10:35:54 1 you're not following them in terms of what's shown.

10:35:56 2 But it will show -- it's available. Whether it shows  
10:35:59 3 up next -- if you're looking at the tweet on your  
10:36:02 4 phone, it's not our position that you're going to see  
10:36:04 5 his bio every time.

10:36:05 6 You'll see him and you can click on it and  
10:36:07 7 see all that language. You'll see his face, but you  
10:36:11 8 won't see all of that language because it's condensed  
10:36:13 9 for the iPhone, or Android, or whatever, the cellphone  
10:36:16 10 viewing.

10:36:16 11 So that's why I say it depends on how  
10:36:18 12 you're viewing it. If you're viewing it on your  
10:36:21 13 computer, though, which most people who are trading  
10:36:23 14 trade on computers, they trade on these big systems  
10:36:25 15 and they have, you know, five or six screens going at  
10:36:28 16 one time. And so they'll have their desktop up and so  
10:36:31 17 they'll see that.

10:36:31 18 So that's information, though, that  
10:36:33 19 regardless of whether it's being viewed by the person,  
10:36:36 20 is available to the person viewing any of  
10:36:40 21 Mr. Hennessey's tweets. So that's number one.

10:36:42 22 But the other part, and this is really  
10:36:44 23 important, is Mr. Hennessey was known for doing due  
10:36:47 24 diligence. He was this kid in college. He's really  
10:36:50 25 into digging into companies. He'd email them. He'd

10:36:54 1 dig into all the SEC filings. He'd dig into the press  
10:36:56 2 releases. He'd try to make connections.

10:36:59 3 He was kind of a crowd sourcing person.  
10:37:01 4 People would email and text him, you know, due  
10:37:05 5 diligence. Hey, I found about this, I found about  
10:37:10 6 that. He'd try to put it all together and -- he would  
10:37:12 7 try to put it all together, and he'd post about that.  
10:37:13 8 So he was known for doing due diligence.

10:37:16 9 And what he would do is he would put the  
10:37:18 10 due diligence in his tweets and he would put his  
10:37:20 11 sources. And that's really important from a legal  
10:37:22 12 perspective. Because to the extent they're saying  
10:37:26 13 that his opinions or his statements are false and  
10:37:28 14 misleading, the fact that he provided to his followers  
10:37:32 15 the basis for his opinion, why he had purchased the  
10:37:36 16 stock, he was giving everyone who viewed his post the  
10:37:40 17 information to make their own decision. And that, as  
10:37:46 18 a legal matter, is legally significant. There are  
10:37:47 19 cases that have held --

10:37:47 20 THE COURT: Okay. Let's back up. Are you  
10:37:49 21 saying they have misquoted any of the tweets?

10:37:53 22 MS. CORDOVA: No. I am saying --

10:37:55 23 THE COURT: If they've quoted him  
10:37:57 24 correctly, I'm going to allow them in.

10:37:57 25 MS. CORDOVA: But he --

10:37:59 1 THE COURT: Now, it could be your job on  
10:38:01 2 cross-examination to say, ladies and gentlemen of the  
10:38:03 3 jury, the government is not being straight with you.  
10:38:05 4 Here's what they left out, and this appears on the  
10:38:09 5 left-hand side of every page, you know, these are just  
10:38:13 6 my opinions, my ideas. Don't trust them.

10:38:17 7 I mean, but it's not -- you know, they  
10:38:20 8 don't have to go back through his whole computer  
10:38:24 9 history and put every single word on there.

10:38:26 10 Now, if they -- I'm not going to let them  
10:38:28 11 misquote it.

10:38:30 12 MS. CORDOVA: The one exception I'll say  
10:38:32 13 to that is that they do not include the actual images.  
10:38:36 14 They excised those, and they put in there a link, as  
10:38:39 15 opposed to -- so in the Garibotti's reports, in these  
10:38:42 16 B exhibits, instead of having the image of the  
10:38:44 17 article, like one of them there said -- he's talking  
10:38:46 18 about the patent life of one of the drugs at issue  
10:38:50 19 that this company owns.

10:38:51 20 And so he includes a clip in the tweet of  
10:38:55 21 the article that talks about the patent life. And  
10:38:58 22 instead of including that clip, they just put a link.  
10:39:00 23 So the jury doesn't see -- and this is -- Your  
10:39:05 24 Honor --

10:39:05 25 THE COURT: Show me -- I wish I could read

10:39:05 1 this.

10:39:05 2 MS. CORDOVA: I know. It's tiny.

10:39:09 3 So there's a little link at the end. They  
10:39:12 4 quote his language and then there's a little -- it's a  
10:39:13 5 URL. So it'll say, like, "http." And that's a link  
10:39:17 6 to the article, but they excised that article, and  
10:39:19 7 that's legally important.

10:39:21 8 And, Your Honor, the other thing -- it's a  
10:39:22 9 Constitutional issue in the sense that they are  
10:39:26 10 requiring -- they have not moved to introduce  
10:39:28 11 Mr. Hennessey's tweets. They have not introduced  
10:39:42 12 Mr. Hennessey's tweets.

10:39:42 13 What they're trying to introduce through a  
10:39:47 14 summary chart are database entries from Twitter about  
10:39:50 15 Mr. Hennessey's tweets. And what they're doing is  
10:39:54 16 they're forcing Mr. Hennessey to himself introduce the  
10:39:56 17 evidence that they will be using to actually seek to  
10:40:00 18 convict him, and that should not be his burden. They  
10:40:02 19 should have to put in the actual evidence, what  
10:40:05 20 actually appeared to followers. It should not be  
10:40:08 21 Mr. Hennessey's duty to do that.

10:40:09 22 So I understand the point about  
10:40:11 23 cross-examination and we're prepared to do that. But  
10:40:12 24 my bigger concern here is that, as his defense  
10:40:15 25 attorney, I'm putting into evidence the actual

10:40:18 1 evidence that they should be putting in to try to get  
10:40:21 2 a conviction.

10:40:22 3 THE COURT: Well, hold on. Then why isn't  
10:40:22 4 your objection to this it's hearsay?

10:40:32 5 MS. EPLEY: We object to hearsay.

10:40:34 6 MS. CORDOVA: It is.

10:40:34 7 THE COURT: Well, it ought to be.

10:40:35 8 MS. CORDOVA: I think that is the  
10:40:37 9 objection, Your Honor.

10:40:40 10 MR. DAVIS: Objection too.

10:40:43 11 MS. CORDOVA: I think, Your Honor, that is  
10:40:43 12 the objection. And I've spent a lot of time trying to  
10:40:46 13 explain it, but that is essentially the objection.

10:40:49 14 THE COURT: I mean, how are you going to  
10:40:50 15 prove this up?

10:40:53 16 MR. ARMSTRONG: Judge, with respect to --  
10:40:54 17 the hearsay point is the easiest one. It's the  
10:40:58 18 party's own statements under 801(d)(2)(a).

10:41:01 19 THE COURT: It's what?

10:41:05 20 MR. ARMSTRONG: It's an opposing party's  
10:41:10 21 own statement under 801(d)(2)(a).

10:41:13 22 Ms. Cordova just said that the content is  
10:41:15 23 accurate. And so to some extent, like, what are we  
10:41:18 24 really doing here?

10:41:19 25 So on the URL point, the reason why we did



not capture the link that's being cited to in the tweet is because we don't know, sitting here today, whether that link shows the same content that was available at that time.

As Your Honor knows, articles change, the format changes. And so we don't know, sitting here in 2024, whether that link is the same link that was linked to, you know, at the time back in 2020 or 2021.

And so what we did as part of the methodology is we just showed that there is a link. And if they want to go and introduce this link, that's fine. They can do that. But we have very clear methodology. We have a very clear explanation for why we did it, and that's that why we did it.

And all of these underlying materials come from the Twitter search warrant return. And so they are business records under 801, 803(6). And the statements of Mr. Hennessey come in under 801(d)(2)(A) as statements of a party opponent.

And so every layer of the hearsay tree is followed through, and there is no question about that. And that is the least meritorious of any of the arguments.

MS. CORDOVA: Your Honor, it's also an objection under 1002, which is the original. And what

1 the government is trying to do -- I think of it as  
2 like if the government were trying to prove contents  
3 of an invoice and say, okay, the invoice says -- if  
4 our position was the invoice had on there the terms of  
5 payment and then that invoice got entered into  
6 QuickBooks and then they got the download from  
7 QuickBooks and the QuickBooks didn't have the terms,  
8 they would say, look, there were no terms. Look, this  
9 is what the invoice -- the information from the  
10 invoice.

11 That's the way Twitter works. They  
12 created a database of specific information, not all of  
13 the information, specific information from these  
14 tweets and the government collected that database.  
15 They did not in their investigation go out and collect  
16 the original documents.

17 So our objection is also under 1502.

18 THE COURT: Wait a minute. What would be  
19 the original documents?

20 MS. CORDOVA: The tweets themselves.

21 THE COURT: A computer hard drive?

22 MS. CORDOVA: The tweets themselves, Your  
23 Honor. And they're available on the Wayback Machine.  
24 And we've collected them and we've produced them to  
25 the government.

MR. ARMSTRONG: So, Your Honor, this is an important point that is being glossed over. Your Honor is looking at a book. Do you want me to give Your Honor some time to look at something?

THE COURT: Pardon me?

MR. ARMSTRONG: I see you're looking at the rule book. Do you want some time to look at that?

THE COURT: No. Go ahead.

MR. ARMSTRONG: Thank you.

MR. FORD: Your Honor, we're talking sort of abstract and theoretically. Can we pull up an example on the computer?

THE COURT: I don't know. I wish you would. I can't read any of the other ones.

MR. FORD: We'll show you what's happening here and how they modified these through the Garibotti chart. So this was -- this is one of the tweets at issue, according to the government, and this was what my client put on Twitter. Clearly meant to be humor.

When you see this sort of tweet in the Garibotti chart, they have removed the video or the image, the meme. And they have replaced it at times and then, of course, as we discussed, highlighted yellow and suggested that it was some sort of false statement.

10:44:46 1 THE COURT: Okay. But I'm missing what  
10:44:47 2 goes with this.

10:44:49 3 MR. FORD: It would be Exhibit --

10:44:50 4 THE COURT: I mean, I wouldn't admit this  
10:44:51 5 by itself. It's irrelevant.

10:44:54 6 MR. FORD: No. It's relevant because it's  
10:44:56 7 listed on Exhibit 14B of the government's exhibit.

10:44:59 8 THE COURT: Okay. Well, that's why I'm  
10:45:00 9 asking you, what goes with it?

10:45:03 10 MR. FORD: Exhibit 14B, which is -- again,  
10:45:07 11 we can pull one up from Exhibit 2B, which is what  
10:45:10 12 we're talking about. And we can pull an example of  
10:45:16 13 one of the tweets that they've modified from Exhibit  
10:45:19 14 2B.

10:45:23 15 THE COURT: Hold on. I'm looking for 14.  
10:45:29 16 Rhonda, it's in the next notebook.

10:45:31 17 MR. ARMSTRONG: Judge, we're not even  
10:45:33 18 contending that that's false. So, like, what are we  
10:45:35 19 even arguing about here?

10:45:42 20 MR. FORD: We're going to pull up an  
10:45:44 21 example from 20B, which the government is arguing is  
10:45:47 22 false. We'll show you first the way it's --

10:45:51 23 THE COURT: Okay. I've got 14B in front  
10:45:53 24 of me.

10:45:54 25 MR. FORD: I apologize. Can --

10:45:56 1 THE COURT: There's not an obvious place  
10:45:58 2 where a picture, like the one you just showed me,  
10:46:00 3 would fit in.

10:46:01 4 MR. FORD: We're going to pull up an  
10:46:03 5 example from 20B, which the government is alleging was  
10:46:07 6 a false statement. 20B.

10:46:15 7 THE COURT: Rhonda, that would be the next  
10:46:16 8 notebook.

10:46:17 9 MR. FORD: Your Honor, we're going to pull  
10:46:19 10 it up right here to make it easier.

10:46:24 11 So can you pause that, Emily? Before  
10:46:27 12 doing that, can you go back to the Garibotti chart?

10:46:29 13 So if you look at the absolute bottom  
10:46:34 14 line, they have, again, highlighted in yellow that the  
10:46:36 15 statement was false. It says: BBI to a dollar,  
10:46:49 16 <https://t.co/3koe4imsw>, and that was a -- they claim  
10:46:51 17 was a false statement in support of securities fraud.

10:46:57 18 What we are objecting to is this is what  
10:46:59 19 my client actually posted on the internet at that  
10:47:04 20 time.

10:47:04 21 Can we start from the beginning and put  
10:47:06 22 the volume up?

10:47:07 23 MR. ARMSTRONG: Which line are we talking  
10:47:09 24 about?

10:47:10 25 MR. FORD: Line 64.

(The video played.)

MR. FORD: The intent of the post was satirical. It was meant to be funny. It was meant to be entertaining. And all of that is removed from the context when they place it into the chart without the actual video or photograph.

Obviously, my client is slightly differently situated in that he was a satirical personality on the internet, and that's how he entertained his Twitter followers.

For other individuals, you'll see that the images that were removed were quotations to due diligence that they did through SEC filings, newspaper articles and so forth. And nearly all of that has been removed from these charts.

MR. ARMSTRONG: Your Honor, they're asking you to exclude evidence and they're not even accurately capturing what our evidence shows. Mr. Ford just says that that video is not in the chart. It's in the chart.

And so there are just extreme liberties being taken here to ask you to exclude stuff. And they're trying to pull the wool over your eyes and not even trying to accurately cite what's actually going on.

10:48:43 1 That video is right here on line 514 of  
10:48:47 2 the chart. This is ridiculous.

10:48:50 3 MS. EPLEY: Your Honor, that makes a  
10:48:51 4 perfect example of how the government uses the exact  
10:48:54 5 same information when it suits their needs and their  
10:48:56 6 narrative. They are the ones who are misleading the  
10:48:59 7 Court and leaving things out of the record.

10:49:01 8 So to be clear, when the defendants'  
10:49:04 9 statements are in the Twitter records, that is hearsay  
10:49:07 10 within hearsay. They need to first get around the  
10:49:09 11 fact that Twitter recorded the records, and their  
10:49:11 12 retention and production are as important as whether  
10:49:14 13 or not it was kept in the regular course or routine to  
10:49:17 14 create at or near. The production and retention --

10:49:17 15 THE COURT: Okay. Let's assume that I  
10:49:21 16 think they're statements of a party opponent.

10:49:23 17 MS. EPLEY: Yes. Then the next piece is,  
10:49:24 18 if I post on Twitter, gosh, it's really cold outside  
10:49:28 19 and I post a picture that shows my dashboard is 110,  
10:49:30 20 degrees, those two things cannot be viewed without  
10:49:32 21 unison.

10:49:34 22 They, by definition, as required, 100  
10:49:38 23 percent of the time are viewed together. You can't  
10:49:39 24 see one without the other, except for in the  
10:49:41 25 government's productions. They split those two items

10:49:44 1 in most cases, but join them --

10:49:46 2 THE COURT: Give me your example again  
10:49:48 3 since I can't see it.

10:49:49 4 MS. EPLEY: Yes. If I, Erin Epley, put on  
10:49:51 5 Twitter, gosh, it's really cold outside. And the  
10:49:53 6 government wants to prosecute me for lying about the  
10:49:56 7 weather, but the picture shows my dashboard as 110  
10:49:59 8 degrees, you have to view those two things together.

10:50:02 9 And when it suits them, they have  
10:50:04 10 precluded it, which brings us back to Ms. Cordova's  
10:50:07 11 point. Then the defense is obligated, in order to  
10:50:10 12 give a clear picture, to produce the government's  
10:50:12 13 evidence. The burden is on them.

10:50:16 14 And instead they want to use narrative in  
10:50:18 15 the equivalent of an Excel spreadsheet. They don't  
10:50:20 16 want us to show the disclaimers. They don't want to  
10:50:23 17 show the context. They don't want to show the icon.

10:50:25 18 And we're asking this Court not to allow  
10:50:27 19 them to keep doing that. To make them put forth the  
10:50:30 20 evidence they want to use and not force us to do it  
10:50:32 21 for them.

10:50:33 22 MR. ARMSTRONG: So, Your Honor, this -- I  
10:50:38 23 guess, Your Honor, what questions do you have?  
10:50:41 24 Because this is kind of like Whac-A-Mole. And so  
10:50:44 25 we're happy to resolve Your Honor's concerns on, like,



1 the multimedia point. When there was a post that  
2 Mr. Ford alleged a second ago that we're not claiming  
3 to be false, yeah, we didn't include it in here  
4 because that would be just reams and reams and reams  
5 and reams of additional pages. And so we tried to  
6 focus, where it was relevant, the multimedia that  
7 attaches to what we allege to be the false statements.

8 So, again, all this stuff is very clear.  
9 And there are reasons why we did it. And a lot of  
10 these objections are just completely spurious and  
11 don't have a basis.

12 And just one last point about  
13 Mr. Hennessey's tweet that I think is important.  
14 There is all this talk about, oh, we need the best  
15 evidence, you know, we need the best evidence. But a  
16 lot of these tweets have been deleted since the  
17 indictment. And so they're saying, oh, my gosh, like  
18 we need the best evidence. Well, sure, where is it?  
19 It's been deleted. So it's no longer on Twitter. So  
20 we can't really see how it looked at the time. We  
21 have some scrapes of it that we took with a paralegal  
22 from before indictment. They were there then. But  
23 now, miraculously, they're not there now. And so  
24 there is some unclean hand arguments going on here as  
25 well.

MS. EPLEY: I know many people want to speak, but just for clarity, so I can sit down.

The first, in terms of best evidence, it is a basic foundation of what every lawyer in this room does, and so him mocking it doesn't make sense to me. The best evidence is available for the vast majority of the defendants, and the obligation is on him to provide it.

But more than that, and for the record, he can either do it now or at trial we can use Rule 106 under optional completeness and force him to do it then.

MR. ARMSTRONG: Judge, the best evidence is the search warrant return from Twitter that has a 902(11) certification that we used to build these records. The best evidence is the Discord return that we used to build these records. All of these records have 902(11) certifications saying that they are business records, and all these records are the statements -- are the parties' own statements under 801(d)(2)(A).

THE COURT: Here's the basic problem. Let's say hypothetically, and I'm going to use the buxom young lady that was drinking the drink that was attached to the video we just watched.

MR. FORD: They included that one, but not the ones where my client is actually presenting why he thinks it's a good stock, but --

THE COURT: Okay. But, I mean, you don't want the tweets where the Lamborghinis are in it, and you objected to all this other stuff. Now, you can't pick and choose. And I'm willing to listen to say, okay, we're going to put everything in. But you can't say, well, Judge, I want everything but this.

Now, it's, I think, totally unreasonable to expect the government, even though I know the burden of proof is on them, to have to go through and put in every tweet. I mean, these guys are tweeting 24/7, and they did it for years. I mean, you know, we couldn't get that much paper into this courtroom.

And I think it's -- they have the right to pick and choose what evidence they want to put in front of the jury as long it's not deceptive. And I've said this before.

Now, having said that, I don't know why, with regard to these tweets -- and how many are we looking at? Hundreds?

MR. FORD: Yeah, Your Honor, we're in the hundreds. I will say this was -- this is giving rise to an apparent Sixth Amendment violation. In

10:54:51 1 Ms. Garibotti's expert report, she did not make the  
10:54:54 2 determination that you're describing. She didn't  
10:54:57 3 decide when to include or not include a tweet. When  
10:55:00 4 to include a video that they think is going to be  
10:55:02 5 prejudicial to the jury, but when to exclude an image  
10:55:06 6 where it's not -- where it would be beneficial to the  
10:55:09 7 defense. Somebody else made that decision.

10:55:10 8 And so when I attempt to cross-examine  
10:55:14 9 her, I will say, well, how -- why did you choose to  
10:55:15 10 put this video in, but not this other video. She's  
10:55:18 11 not going to have an answer, because she says in her  
10:55:21 12 report she didn't do it, it was fed to her by the DOJ.  
10:55:24 13 That would require me to call Mr. Armstrong, or  
10:55:27 14 whoever made this determination --

10:55:29 15 THE COURT: And your next question is not  
10:55:30 16 going to be, so you didn't look at this and you didn't  
10:55:33 17 look at this and you didn't look at this and you  
10:55:35 18 didn't look at this, all the way down?

10:55:37 19 MR. FORD: It will be, but I'll never have  
10:55:38 20 an opportunity to confront the individual who made the  
10:55:42 21 testimonial determination to include or not include.  
10:55:44 22 And so I can't present an argument to the jury without  
10:55:47 23 confronting them, and I don't know who it is. It  
10:55:50 24 could have -- you know, but she did not make these  
10:55:53 25 determinations. This is an inherently testimonial

document by virtue of determining to include, but not include other information. It's right there in the first two pages of her report that she didn't make that decision.

MR. ARMSTRONG: Judge, every single summary chart since the beginning of time involves information that one lawyer thinks is important or not. This is not a Constitutional issue. This is everything that happens in trial and has been happening in trial since probably well before Your Honor's time.

So to argue that, like, a selection of information to put before the jury is a Constitutional violation is just far out of bounds.

MR. FORD: Normally the expert in these situations, especially when they're paid \$750,000, the expert makes the decision and that's very easy because you ask the expert, why did you make this decision and they explain it, right?

In this situation, we are cut off at the knees. We'll never be able to assert our Sixth Amendment right and ask the summary witness why it was that she selected some statements and not other statements.

THE COURT: You want to weigh in?

MR. REYES: Yes, Your Honor, just briefly.

Just something that you haven't heard yet, which is --

THE COURT REPORTER: Can you move that mic down?

MR. REYES: Yes, ma'am.

THE COURT: She's never happy. She either wants the mic up or down.

MR. REYES: I could step on his phonebook. No, just kidding.

Your Honor, I have here -- we actually created some demonstrative counter exhibits to illustrate these points. I can hand these to the Court, but --

THE COURT: Give them to Rhonda.

MR. REYES: In terms of what's going on here, in terms of the idea of deception or misleading, which would be enough, they have part -- they have the quote, but they don't have the whole proper representation of what is actually being said by the defendant.

So, first of all, Your Honor, we went back and found the things that were from the URL, which Mr. Armstrong said they may have been deleted. We found it all in their production. It's there. They have it. We sourced it.

10:58:13 1 If you look under our images, it gives you  
10:58:15 2 the DOJ stamp. That's where we got it. It took a lot  
10:58:20 3 of work, but the -- all the reports are replete with  
10:58:24 4 those types. So you'll see an image there where  
10:58:26 5 Mr. Matlock says something about a stock, but the link  
10:58:28 6 actually shows you objective publicly available data  
10:58:32 7 that he's quoting or from someone else who is posting  
10:58:35 8 it, right?

10:58:36 9 So to the extent that these things are  
10:58:38 10 about attribution to our defendant, our defendants are  
10:58:41 11 saying where they got this information. In that first  
10:58:46 12 quote, he's quoting another person in the market. In  
10:58:48 13 the next few pages, he's quoting all kinds of data,  
10:58:51 14 things that are -- again, are actually available,  
10:58:54 15 which were the full picture of what he was saying at  
10:58:57 16 the time.

10:58:57 17 Now, yes, we can cross-examine about these  
10:59:00 18 things, but it is misleading. And six weeks later  
10:59:03 19 what the jury -- or ten weeks, God bless, 14  
10:59:07 20 weeks later -- not 14, but when the jury finally gets  
10:59:10 21 this case, and these things go back to the jury, are  
10:59:14 22 they going to remember the cross-examination and all  
10:59:16 23 the things that are missing and the other pages have  
10:59:22 24 a --

10:59:22 25 THE COURT: You mean a week later?

MR. REYES: From your mouth to God's ears.

MR. ARMSTRONG: So, Your Honor, that issue that Mr. Reyes is raising is extremely relevant, because Mr. Matlock is one of the individuals who deleted a lot of his tweets. And so we're going to have a witness testify from the SEC that explains that a lot of the tweets that are cited in these charts were scraped from open source data. And they're not actually available in the Twitter return because they were deleted by Mr. Matlock.

So, again, all of these arguments about, oh, the best evidence ring really hollow when a lot of these messages were deleted by the defendants themselves.

THE COURT: Okay. Why isn't this all cured by admitting all the tweets?

MR. ARMSTRONG: I'm sorry, I'm not sure I follow you.

THE COURT: Well, let's say we don't like this tweet because it's just the summary, or it's just a part. It's actually the top portion of this. And we have notebooks, because it's not like we have a shortage of notebooks or documents, that contain all the tweets.

So the entire tweet is in evidence.



11:00:39 1 MR. REYES: Your Honor --

11:00:40 2 MS. CORDOVA: Go ahead.

11:00:41 3 MR. REYES: I was just going to quote you.

11:00:44 4 I was going to quote Ms. Cordova, which is it's not  
11:00:45 5 our case, it's not our burden to admit evidence that  
11:00:48 6 they would then use against us.

11:00:49 7 Now, like I said earlier --

11:00:51 8 THE COURT: Well, I know. You're  
11:00:53 9 objecting to the government's saying it's not  
11:00:57 10 complete. We'll put it in there. It'll be in  
11:01:02 11 evidence. And then the government will have their  
11:01:04 12 summary and they can say, yeah, this came from  
11:01:09 13 page 152 of notebook number 8. And you see the entire  
11:01:13 14 tweet. And you guys can get up on cross-examination  
11:01:16 15 and pick up notebook number 8 at page 152 and question  
11:01:21 16 the witness from it.

11:01:22 17 Why doesn't that solve it?

11:01:25 18 MS. CORDOVA: Your Honor, they never  
11:01:26 19 collected the actual tweets in this case.

11:01:29 20 THE COURT: Well, they had to collect  
11:01:31 21 something or they wouldn't have this information.

11:01:33 22 MS. CORDOVA: Well, what they did -- and  
11:01:34 23 it's a fine investigative technique, but what they did  
11:01:37 24 is they served a search warrant to Twitter. Twitter  
11:01:39 25 has a database, like I said, it's just like a

1 QuickBooks or anything else. It collects specific  
2 data points. They save it in this big database, and  
3 then they spit that database out to the government.

4 They didn't provide the tweets to the  
5 government. They provided data in a database.

6 Now what the government could have done  
7 with that is then go to the Wayback Machine and  
8 collect the tweets, because they're all there, and so,  
9 okay, here's the tweet, here's the tweet, here's, the  
10 tweet, and then they would --

11 THE COURT: Well, I'm hearing they're not  
12 all there, but go ahead.

13 MS. CORDOVA: No, they are on the Wayback  
14 Machine. And that's what we have.

15 Your Honor, I also want to address that  
16 comment about Mr. Hennessey's tweets. Mr. Hennessey  
17 did delete tweets prior to ever learning of an  
18 investigation or this indictment, which he learned  
19 about the investigation when the FBI knocked on his  
20 door at 6:00 a.m. the day he was arrested. So he --  
21 there is absolutely no unclean hands here. And they  
22 should be precluded, absolutely precluded from  
23 mentioning anything like that to the jury.

24 Every single one of his tweets -- and some  
25 of the ones that the government has marked as false

1 are actually still on Twitter, which is a little bit  
2 ironic, given that they're saying that this was  
3 somehow nefarious. But every single one of his tweets  
4 is available on the Wayback Machine. And they haven't  
5 gone to look for it, but it's there. They didn't  
6 collect it. They didn't produce it. They didn't mark  
7 it as exhibits.

8 So we should not be in a position where  
9 we're presenting the true evidence in the case against  
10 our own clients.

11 MR. ARMSTRONG: Judge, just to put a bow  
12 on this. We used search warrant materials. Search  
13 warrant materials, from the beginning of time, have  
14 been the best evidence and they have been unassailable  
15 because they are directly from the party that hosts  
16 and keeps the data as their own business records.

17 And we're summarizing that material in  
18 these records. So all these arguments go to the  
19 weight, not to the admissibility, because every single  
20 tweet in here, we source and explain why it's not  
21 hearsay, why it's authentic and why it is admissible.

22 They can argue all day that our summary  
23 charts, our evidence should have included X, Y, and Z.  
24 That's all we're talking about. We're just talking  
25 about arguments about weight. We have a very clear

11:03:50 1 methodology as to how these were done, how they were  
11:03:53 2 created, and why every single piece in here is  
11:03:56 3 otherwise admissible.

11:03:57 4 MR. FORD: Your Honor, if I may quickly.  
11:03:59 5 We were just going to pull something up for you to see  
11:04:02 6 on a point I made earlier. With regards to the last  
11:04:07 7 comment, you know, whatever Twitter data they  
11:04:11 8 received, nobody ever saw, right? And the argument  
11:04:15 9 being presented by the government --

11:04:17 10 THE COURT: Wait, wait, wait. Somebody  
11:04:18 11 had to see it.

11:04:19 12 MR. FORD: No, no. Because what they  
11:04:21 13 saw -- what they would have seen was tweets. They  
11:04:23 14 wouldn't have seen what we received from Twitter,  
11:04:25 15 which is HTML we're about to show you in one second.  
11:04:31 16 So let me go to this first point, which is, this is  
11:04:33 17 the scope of what Ms. Garibotti said she was going to  
11:04:36 18 do at trial. She was going to calculate the profits.  
11:04:44 19 And then summarize at-issue activity and public  
11:04:48 20 communications that reference the applicable security  
11:04:50 21 and then was asked to flag statements that the DOJ  
11:04:57 22 alleges to be false.

11:04:58 23 In other words, she was never hired to  
11:05:01 24 make a determination about what tweets to include or  
11:05:04 25 whether those tweets were false. Again, this raises

11:05:07 1 the significant Sixth Amendment issue, because we  
11:05:10 2 won't be able to effectively cross-examine her or  
11:05:13 3 anybody because we don't know who made that  
11:05:15 4 determination.

11:05:17 5 To go back to the first point, Emily, if  
11:05:23 6 we can pull the BBI example of the video we showed so  
11:05:26 7 you can -- you can see, Your Honor, what they saw --  
11:05:31 8 not the actual -- the Twitter return data. Not the  
11:05:35 9 video.

11:05:41 10 THE COURT: All I can say is this person  
11:05:43 11 looks like she's having more fun.

11:05:54 12 MR. FORD: Well, yeah. So this is what  
11:05:55 13 the government received from Twitter. It's an  
11:05:59 14 excerpt. And this shows, if you look, it says, BBI to  
11:06:04 15 a dollar with the link and then, you know, we scroll  
11:06:09 16 down. It's gibberish. It's HTML code. That's the  
11:06:14 17 coding for the video.

11:06:16 18 That's what the government received from  
11:06:18 19 Twitter. So that's the only evidence they have. It  
11:06:22 20 is bad evidence for a bad case, but this is their  
11:06:25 21 evidence.

11:06:26 22 THE COURT: Well, wait. This may be a bad  
11:06:27 23 example, but, I mean, that is the only text on this  
11:06:31 24 that you've showed me is what the government quoted.

11:06:35 25 MR. ARMSTRONG: Exactly. What are we

11:06:36 1 talking about?

11:06:37 2 MR. FORD: We're talking about the fact  
11:06:38 3 that nobody on the planet saw this, because it was  
11:06:43 4 obtained by search warrant for this case and is now  
11:06:46 5 being introduced as evidence that individuals who were  
11:06:52 6 Twitter followers saw this. They never saw this HTML  
11:06:57 7 data. All this does is reflect the fact that these  
11:06:58 8 actions occurred on the internet.

11:06:58 9 THE COURT: This, I'm not following you  
11:06:59 10 on. I'm not following your argument here.

11:07:02 11 MR. ARMSTRONG: We're not offering this  
11:07:04 12 data -- this data was pulled together and it was  
11:07:09 13 depicted in the same way that --

11:07:11 14 THE COURT: I mean, go back to your video.  
11:07:13 15 The only thing they're saying is that --

11:07:19 16 MR. FORD: Right. But nobody saw --

11:07:21 17 THE COURT: -- we've got the spring  
11:07:22 18 breaker.

11:07:23 19 MR. FORD: Nobody saw just that, right?  
11:07:26 20 The issue is they're making the argument that people  
11:07:28 21 saw this and acted on it. But the evidence they're  
11:07:30 22 seeking to introduce from the Twitter return does not  
11:07:33 23 reflect data that anybody saw or acted on. Nobody on  
11:07:37 24 the witness stand can say, I saw this tweet and acted  
11:07:40 25 on it, because they would not have seen this HTML

11:07:44 1 data.

11:07:44 2 What they would have seen, if they saw it,  
11:07:46 3 was the video that we're showing to you.

11:07:49 4 THE COURT: It's the same thing.

11:07:50 5 MR. FORD: No -- well, no. Because what  
11:07:52 6 my client posted is a video of a girl chugging a beer  
11:07:55 7 on spring break as a joke. That's what they would  
11:07:58 8 have seen.

11:07:58 9 And, remember, we're --

11:08:00 10 THE COURT: Well, the caption is, dollar  
11:08:05 11 sign BBI to \$1.

11:08:09 12 MR. ARMSTRONG: That's why we're offering  
11:08:10 13 it, Your Honor, for that statement.

11:08:11 14 MR. FORD: That's exactly correct.

11:08:12 15 THE COURT: So I'm missing your point,  
11:08:14 16 Mr. Ford. I mean, the government has accurately  
11:08:16 17 quoted that.

11:08:18 18 MR. ARMSTRONG: 100 percent.

11:08:20 19 MR. FORD: They have not accurately quoted  
11:08:21 20 that. The materiality standard, as well as even  
11:08:25 21 Federal Rule 106 of the Rules of Evidence, requires  
11:08:28 22 that the entire communication be put into evidence.  
11:08:33 23 They failed to obtain this prior to filing this  
11:08:37 24 indictment and purporting to litigate this case. It  
11:08:40 25 was a flaw by the government to not obtain the actual

11:08:43 1 evidence that could be used at trial.

11:08:45 2 MR. ARMSTRONG: Your Honor, this is just  
11:08:46 3 gobbledygook at this point. Our line in our  
11:08:49 4 exhibit -- can I hand it up to Your Honor?

11:08:53 5 -- line 514 it shows exactly what Mr. Ford  
11:08:56 6 is talking about. This is just nonsense.

11:08:58 7 MR. FORD: Your Honor, the point -- look,  
11:09:04 8 we are showing you two separate sets of examples where  
11:09:06 9 the government includes the video where it's  
11:09:08 10 prejudicial to the client, and they think it will make  
11:09:11 11 him look bad, and then they remove the image when it  
11:09:15 12 would be beneficial to the defense.

11:09:18 13 That decision was outside of the scope of  
11:09:20 14 Ms. Garibotti's work. She is not -- she cannot  
11:09:24 15 testify about it because she didn't do it. So who did  
11:09:27 16 it? Who provided the data? According to her report,  
11:09:29 17 it was not by the FBI. So there will not be an agent  
11:09:34 18 testifying. It was provided by the DOJ.

11:09:37 19 We have a right to examine the individual  
11:09:40 20 from the DOJ who was providing this information and  
11:09:42 21 they do not appear anywhere on their witness list.

11:09:46 22 MR. ARMSTRONG: Judge, they've made this  
11:09:48 23 whole fuss about how Ms. Garibotti cannot talk about  
11:09:50 24 the falsity of the statements. And that's fine. Your  
11:09:54 25 Honor made your ruling on that.



11:09:55 1 But that's why we chose to put certain  
11:10:00 2 ones in because they related to the false statements.  
11:10:02 3 And Your Honor hit the nail on the head. If we  
11:10:05 4 included every multimedia from every single post about  
11:10:08 5 this, random things about a stock, these summary  
11:10:11 6 charts which are accurate and are admissible, would be  
11:10:15 7 five times in length. And that's just totally  
11:10:17 8 unwieldy.

11:10:19 9 MS. EPLEY: The burden is on the  
11:10:20 10 government, unwieldy or not. The Rules of Evidence  
11:10:23 11 allows for a business record to be used in regards to  
11:10:26 12 hearsay because it meets particular norms. Part of  
11:10:30 13 that is the production and the retention, which the  
11:10:34 14 government does not have.

11:10:35 15 They want to offer the Garibotti charts  
11:10:37 16 with the equivalent of Excel lines to establish a  
11:10:40 17 timeline and to create gravitas in regards to what  
11:10:43 18 they think is relevant to their case, as they're  
11:10:47 19 entitled to do.

11:10:47 20 And they want to do it without putting in  
11:10:49 21 the underlying records, without allowing the defense  
11:10:51 22 the ability to have admissible evidence to move  
11:10:53 23 forward in regards to put forth that evidence. As you  
11:10:58 24 will find soon, they're going to object to each and  
11:11:00 25 every one of our tweets.

11:11:01 1 They do that despite the fact that this  
11:11:03 2 isn't being presented the way it would have been  
11:11:05 3 originally perceived, which is their onus. They act  
11:11:07 4 like it's ridiculous for us to object to that, which  
11:11:10 5 is on the face false, and then they offer partial  
11:11:14 6 evidence.

11:11:15 7 It was not viewed as an HTTPS link. It  
11:11:19 8 was viewed as a website source. And whether that is  
11:11:22 9 damning to the defendants or useful to them is not  
11:11:25 10 something that they get to determine in regards to  
11:11:27 11 what is admissible evidence. They are keeping it away  
11:11:30 12 from the jury and they're not entitled to do it.  
11:11:33 13 Optional completeness requires they show it. Fairness  
11:11:36 14 requires they show it. And it's their job to show it,  
11:11:39 15 difficult or not.

11:11:40 16 So if the business record had shown up as  
11:11:42 17 reams of evidence with photographs, they could admit  
11:11:44 18 it that way as a business record. But it did not.

11:11:49 19 Their other attempt to get it in over and  
11:11:50 20 around hearsay would be to bring an actual human who  
11:11:54 21 saw the actual tweet. Would that be cumbersome? Yes.  
11:11:57 22 Would it be an exception to hearsay because they can  
11:11:59 23 get around it for other reasons? Yes. But they don't  
11:12:03 24 get to short circuit it because it's hard. It should  
11:12:04 25 be hard. People's liberty is at stake.

11:12:06 1 MR. ARMSTRONG: Your Honor, that was a  
11:12:06 2 fantastic speech. But what's going on here, Your  
11:12:09 3 Honor, is that they have the underlying data. They  
11:12:14 4 have the information. If they want to claim that some  
11:12:18 5 photo from five days before they sold is important,  
11:12:22 6 have at it, guys. They can do that. And they can  
11:12:25 7 introduce some multimedia for some random tweet that  
11:12:28 8 we're not even alleging is going to be false. And so  
11:12:31 9 a lot of this is just hysterical -- I'm going to be  
11:12:35 10 honest -- nonsense, trying to hide the ball and shift  
11:12:37 11 it.

11:12:39 12 MR. REYES: Your Honor, briefly. The  
11:12:41 13 Garibotti report is trying to portray what PJ Matlock  
11:12:46 14 or anyone else said in the public square and was heard  
11:12:48 15 by the public. But it's not saying that. It's saying  
11:12:52 16 what -- only part of what he said. What he really  
11:12:55 17 said was all that, plus a picture of, by the way, this  
11:12:59 18 report says this is good. It's not what he said.  
11:13:04 19 It's not what the public consumed. It's impartial and  
11:13:08 20 it's incomplete.

11:13:10 21 MR. ARMSTRONG: Your Honor, there is zero  
11:13:11 22 part of our evidence that is going to turn on a news  
11:13:17 23 article. Our case is what the defendants said about  
11:13:21 24 their positions and what they expected the stock to do  
11:13:24 25 and then what they did in private.

11:13:26 1 If they want to make this case about news  
11:13:28 2 articles and links to articles, they are within their  
11:13:31 3 rights to do. That's not our case. And both sides  
11:13:34 4 get to litigate their case.

11:13:36 5 MS. EPLEY: If that were true, volume  
11:13:39 6 charts would be irrelevant. People making money or  
11:13:42 7 losing money, including the defendants, would be  
11:13:43 8 irrelevant, and this case would be very, very tidy.

11:13:47 9 They would come in and show you the tweet  
11:13:49 10 and then they would show you the trading position and  
11:13:53 11 they would rest their case. They are not doing that  
11:13:55 12 because it's not compelling.

11:13:56 13 Instead, what they want to do is make very  
11:13:59 14 legal actions look illegal. It is okay to purchase in  
11:14:02 15 unison, knowing it's for your benefit, and sell it.  
11:14:06 16 And they want to include that in price structure, but  
11:14:08 17 prevent us from showing news articles attached or a  
11:14:12 18 girl chugging beer that might go to materiality of  
11:14:14 19 whether or not you should follow their tweet.

11:14:17 20 MR. ARMSTRONG: No one is preventing  
11:14:18 21 anyone from doing any of that. If they want to raise  
11:14:21 22 those issues, they can raise those issues. These are  
11:14:23 23 our charts. The methodology is clear. It's  
11:14:26 24 admissible evidence.

11:14:28 25 THE COURT: Let me ask you a question.

11:14:34 1 Let's play this out. You've got Ms. Garibotti on the  
11:14:41 2 stand. You've asked her about -- let's take one of  
11:14:46 3 these. And it's succinct. Yes, this is what the  
11:14:52 4 tweet says. And it does say that, because you've  
11:14:56 5 accurately summarized some of it. And the defendants  
11:15:01 6 get up with the full tweet and say, what about the  
11:15:05 7 rest of this?

11:15:06 8 Are you going to object to that?

11:15:10 9 MR. ARMSTRONG: Your Honor, I don't think  
11:15:11 10 that's going to be the case, but if they want to do  
11:15:13 11 that, sure, they can do that. If they want to say,  
11:15:18 12 oh, my gosh, look at this press release that was  
11:15:20 13 linked to this tweet, if that's an accurate press  
11:15:23 14 release, sure.

11:15:23 15 Again, our case is not press releases.  
11:15:25 16 It's about what they said about their positions and  
11:15:27 17 where they expected the price to go supposedly at the  
11:15:29 18 same time they were selling.

11:15:30 19 THE COURT: Okay. So if you're not  
11:15:32 20 objecting to that, let me go back to my original  
11:15:37 21 suggestion, which is why don't we admit all the  
11:15:40 22 tweets? And have them in notebooks and, you know,  
11:15:47 23 then your summary is fine. You can pick and choose  
11:15:51 24 whatever you want. They can pick and choose whatever  
11:15:54 25 they want. And the jury can decide.

MR. ARMSTRONG: So, Your Honor, I think that is throwing the baby out with the bath water a little bit. We're talking about tweets that are in a specific episode. And so to the extent they're making a Rule of Completeness argument, they have the burden to show why something is incomplete.

THE COURT: Well, let's say we do all the tweets that are in these pages.

MR. ARMSTRONG: Your Honor, I think that's for --

THE COURT: I mean, these are pages you guys have said are relevant.

MR. ARMSTRONG: So I think that for Ms. Garibotti's charts, what we have done is we have included all of the tweets that have the ticker symbol in them. And so every tweet that has, for example, BBI that we just looked at in Government Exhibit 20, every tweet from Mr. Constantinescu that has "dollar sign BBI" is included in the chart already.

And so if there are other tweets that they think are relevant about BBI for Rule of Completeness, it's their burden to show, not ours, why it is relevant and it's necessary to complete the picture.

THE COURT: I'm not -- I mean, I'll decide what's relevant. What I'm deciding is let's get

beyond this issue. And the way to get beyond it that satisfies everybody is to say if they're -- assuming they're relevant, let's admit all the tweets.

MR. ARMSTRONG: Judge, it's impossible for me to evaluate that in a vacuum. There are, as you mentioned, hundreds of thousands of tweets. And for these relevant periods of time, we included in these charts the tweets about the tickers that we're alleging to be --

THE COURT: All right. Well, let's admit all the tweets about the tickers.

MR. ARMSTRONG: But, Your Honor -- but they're in the charts. That's what I'm saying, Your Honor. The tweets -- the charts --

THE COURT: Then it's not the entire tweet.

MR. ARMSTRONG: Well, then, if they want to come back and say you should have included this press release, they can do that on cross-examination. That's fine.

MS. CORDOVA: It's not the press release. I think Your Honor understands it's the full context, the full statement in the tweet, what he actually -- what the people saw when they viewed our clients' tweets.

11:18:12 1 And I think the government's hesitation  
11:18:14 2 here is that their case is about nondisclosure. They  
11:18:19 3 have alleged that, for example, Mr. Hennessey, when he  
11:18:22 4 said "I'm long surf," that that was misleading because  
11:18:25 5 he was trying to get people to believe that he was  
11:18:27 6 going to hold it for a long time. That's just  
11:18:29 7 absolutely not true.

11:18:30 8 At the same time, this is what they've  
11:18:34 9 studiously avoided presenting and including in their  
11:18:36 10 exhibits. At the very same time in his bio he said, I  
11:18:39 11 actively trade positions. I could be buying or  
11:18:41 12 selling any stock mentioned at any time. Like I said,  
11:18:44 13 not a disclaimer. It's who he is and what he's doing.  
11:18:47 14 It's right there. It's a disclosure that he's making  
11:18:50 15 to everybody who is viewing his tweets at the same  
11:18:52 16 time.

11:18:52 17 And they are studiously, adamantly seeking  
11:18:56 18 to keep that from the jury. So that I believe is why  
11:18:59 19 Mr. Armstrong is hesitating here.

11:19:02 20 MR. ARMSTRONG: Your Honor, I'm not taking  
11:19:03 21 liberties with Ms. Cordova's position, and I would  
11:19:07 22 appreciate if she didn't take liberties with mine.

11:19:10 23 I think that what is going on here is that  
11:19:11 24 if Your Honor wants to admit those header information  
11:19:14 25 on their Twitter profiles, fine. We're going to argue



11:19:17 1 all day that those kinds of statements are misleading  
11:19:19 2 part and parcel with everything else that the  
11:19:21 3 defendants said. Because what they're not --

11:19:23 4 THE COURT: I missed that. You went too  
11:19:25 5 fast. What is misleading?

11:19:27 6 MR. ARMSTRONG: Sure. That, oh, my gosh,  
11:19:28 7 look at this Twitter disclaimer that I have on my  
11:19:31 8 profile picture. We're going to argue all day, every  
11:19:34 9 day, and compellingly that that statement in and of  
11:19:37 10 itself is also misleading. Because what they're not  
11:19:39 11 doing is they're not saying, hey, guys, what I'm going  
11:19:41 12 to do is dump my shares the second I post. And so  
11:19:44 13 it's a sleight of hand.

11:19:47 14 THE COURT: No. I understand what your  
11:19:48 15 position is. I mean, and I understand what their  
11:19:49 16 position is.

11:19:50 17 MR. ARMSTRONG: Exactly. And so if Your  
11:19:51 18 Honor is inclined to let those kind of profile  
11:19:53 19 pictures in, fine. Let them in. We'll hash it out  
11:19:57 20 and win that argument every time.

11:20:01 21 MR. REYES: I'll bet against that, Your  
11:20:04 22 Honor.

11:20:04 23 But really briefly I will say that there  
11:20:06 24 is a third category here of things that are not  
11:20:10 25 in these -- on these posts, which are actually --

11:20:13 1 THE COURT: Which are something really  
11:20:14 2 simple?

11:20:15 3 MR. REYES: Very simple. Very simple.

11:20:17 4 In the vein of saying I'm not a financial  
11:20:19 5 advisor and things like that, Mr. Matlock actually  
11:20:25 6 says things during these episodes contemporaneously  
11:20:28 7 that are not in these reports. All right. So if  
11:20:30 8 we're going to include the tweets, obviously we would  
11:20:33 9 proffer all the tweets that are relevant to this time  
11:20:38 10 period that go specifically -- and there is -- you  
11:20:40 11 know, it's not hundreds of extra tweets. There's some  
11:20:42 12 very specific tweets, for example, in the stock that's  
11:20:46 13 ALZN, Mr. Matlock's tweets about trade your own plan  
11:20:50 14 and things like that, are completely omitted from the  
11:20:54 15 reports.

11:20:55 16 Yes, we could tell -- we can cross-examine  
11:20:56 17 the witness on it. But, again, two months later when  
11:20:59 18 the jury has these charts in front of them and those  
11:21:01 19 tweets aren't in there, you know, who knows what they  
11:21:04 20 remember. At the end of the day, all of it is  
11:21:06 21 relevant to the state of mind. And we would ask, if  
11:21:10 22 we are going to admit the tweets, let's admit all the  
11:21:13 23 relevant tweets.

11:21:15 24 MR. ARMSTRONG: Again, Your Honor, this  
11:21:16 25 goes to the methodology, which we have discussed at

length. Tweets like that are not included in the charts because they don't reference the specific ticker.

Again, if they think that there is something in this period of time that is needed for the Rule of Completeness, it's their burden on them to explain why. We cannot talk about this stuff in vacuum when we have 30 tickers that we're talking about and multiple periods of time.

If they think that a specific document is relevant in the Rule of Completeness, they have the burden, they have to show it.

MR. REYES: We can and we will, Your Honor. But to the extent that -- the cumulative effect is that these documents, as proposed, are misleading to the jury and should not be admissible in the form that they're in.

MR. ARMSTRONG: They're not misleading.

MS. CORDOVA: And, Your Honor, I'll just note -- I've said it before, but I think it's really important -- the government cannot shift the burden to us to present the evidence that they need to prove their case, and that's what they're doing here.

If this case were about invoices and they just went and got the Quicken's database of what date,

11:22:23 1 how much, who it sent to, and then they tried to  
11:22:25 2 introduce that as evidence of what the invoice said,  
11:22:29 3 nobody would -- that's ridiculous. No. You have to  
11:22:32 4 bring the invoice. What did it say? What were the  
11:22:34 5 terms? What was written on the invoice?

11:22:36 6 It's the same thing here. They didn't  
11:22:37 7 collect the invoices. And so now they're trying to  
11:22:39 8 present the jury -- and this is a case about  
11:22:42 9 nondisclosure. So they're trying to say this is what  
11:22:45 10 the invoice said from the database. But the database  
11:22:47 11 didn't collect all the information that was on that  
11:22:50 12 invoice.

11:22:50 13 It's the same thing here. And it's their  
11:22:52 14 burden, not ours. It's their burden and they can't  
11:22:55 15 shift it to us.

11:22:57 16 MR. ARMSTRONG: Judge --

11:23:00 17 THE COURT: It's not their burden, though,  
11:23:03 18 is it, to -- if you've got something that -- an  
11:23:07 19 objection that something is not complete, isn't it  
11:23:10 20 your burden to make that objection and say optional  
11:23:13 21 completeness, Judge, you ought to show the entire  
11:23:16 22 document?

11:23:17 23 MS. CORDOVA: That's true, Your Honor.  
11:23:18 24 But these are not the actual documents. These are not  
11:23:20 25 the actual tweets. What they're trying to introduce

1 is bits and pieces, data points, that they have  
2 selectively collected, put together in charts and said  
3 this is the tweet. It's not.

4 They have the burden to actually present  
5 the actual document if that's what they're going to  
6 try to convict our clients on.

7 MR. ARMSTRONG: And, Judge, you know, I  
8 don't know how many times you want to hear this, but  
9 that's what we did. We used search warrant returns.  
10 And we put them into the charts. Again, we're just  
11 going in circles about this.

12 MR. WILLIAMS: Judge, I have a suggestion  
13 more than an argument. I believe there is some  
14 talking past each other going on.

15 The search warrant data was produced as a  
16 data, not as someone visually would have seen it on  
17 Twitter, whether they're on computer or phone. Okay?

18 THE COURT: All right.

19 MR. WILLIAMS: So you're seeing the  
20 subtitles without the movie. Now, as the Court has  
21 suggested, I have observed everyone's exhibit lists.  
22 And they all have hundreds of tweets on them, either  
23 screenshots, Wayback Machine, or from the data  
24 production pursuant to the search warrant. We could  
25 save a lot of time for Your Honor and the jury if we

1 just agree to admit everybody's tweets, all  
2 defendants, all prosecution, and then game on in front  
3 of the jury.

4 MR. ARMSTRONG: Judge, that is -- that's  
5 not even close to the Rules of Evidence.

6 MR. WILLIAMS: Including the Wayback  
7 tweets, Your Honor.

8 MR. ARMSTRONG: There are supposed to be  
9 Rules of Evidence about hearsay. And a defendant  
10 cannot just dump in tens of thousands of his own  
11 tweets and use them to prove whatever he wants. We  
12 are entitled to use their own statements under  
13 801(d)(2)(A). They are not entitled to use their own  
14 statements because they're hearsay.

15 If they want to get up and testify on the  
16 stand about their own out-of-court statements, they  
17 can do that every single day. But they can't just  
18 dump in their own statements, thousands of them, and  
19 say fair is fair. That's not how the rules work.

20 MS. EPLEY: Because anything that would  
21 have been perceived against the defendant from a  
22 tweet would have had to be -- I mean, viewed in that  
23 context. It goes to the effect on the listener in  
24 regards to materiality.

25 There are additional layers and responses

11:25:27 1 that will be developed at trial. But at the very  
11:25:29 2 first, at the 10,000-foot view, it's the universe in  
11:25:32 3 which anything that they are saying would have been  
11:25:34 4 viewed by anyone who cared to watch it.

11:25:36 5 If I acted on that tweet, it is either  
11:25:39 6 because I have watched Tommy long enough to know how  
11:25:42 7 he trades and what he trades about, in which case  
11:25:45 8 these are relevant because it goes to their knowledge;  
11:25:47 9 or I don't know him at all, in which case it goes to  
11:25:50 10 lack of materiality.

11:25:52 11 MR. FORD: Your Honor, we just published  
11:25:54 12 something that I think will be of use to you.  
11:25:57 13 These -- we've met and conferred and the government  
11:25:59 14 said that they were seeking to exclude every single  
11:26:03 15 defense exhibit being offered. That was as far as we  
11:26:07 16 got on the meet-and-confer.

11:26:09 17 Now, my client tweeted hundreds and  
11:26:14 18 hundreds of time. We've included, I think, about 150  
11:26:17 19 examples of my client tweeting things such as this,  
11:26:19 20 where he would provide sort of guidance to people who  
11:26:21 21 are up and coming and learning how to trade. So in  
11:26:24 22 this particular one he says, no, he says, I would do  
11:26:26 23 paper trading if you're just starting out.

11:26:28 24 What paper trading is is when you open a  
11:26:31 25 brokerage account, such as TD Ameritrade, it allows

11:26:34 1 you to put a fake amount of money in, say, \$100,000  
11:26:37 2 and you can just day trade all day. And that way you  
11:26:41 3 see, am I losing money? Am I making money?

11:26:43 4 And so what -- one of the things that my  
11:26:44 5 client would repeatedly tweet to people is if you're  
11:26:48 6 not making money, if you're having a hard time, just  
11:26:50 7 do paper trading. And, of course, if somebody is  
11:26:53 8 doing paper trading, they're not executing actual  
11:26:56 9 transactions in the market and the government's theory  
11:26:59 10 falls apart.

11:27:00 11 This is just one of many of the rules of  
11:27:02 12 the road that my client was providing to people --

11:27:05 13 THE COURT: Why doesn't this fall into the  
11:27:07 14 category, Mr. Ford, that Mr. Armstrong just pointed  
11:27:13 15 out, that, you know, if you want to sell that story,  
11:27:20 16 have your client get on the stand and say, look how I  
11:27:23 17 warned people.

11:27:25 18 MR. FORD: Well, there's multiple -- one  
11:27:27 19 that we would like this -- we would like this -- we're  
11:27:30 20 going to seek to have this pre-admitted. It is during  
11:27:32 21 the conspiracy time period. It is not a hearsay  
11:27:35 22 statement. And -- what I heard Your Honor just say is  
11:27:40 23 under Rule 106, Rule of Completeness, that we would be  
11:27:43 24 permitted to put these in, so --

11:27:49 25 THE COURT: Well, wait a minute. You



1 didn't hear me say that just because one tweet comes  
2 in, every tweet comes in.

3 MR. FORD: But this is a tweet --

4 THE COURT: Now I did suggest that. But I  
5 didn't see everybody running up and saying, yeah,  
6 Judge, we're on board.

7 MR. FORD: Well, Your Honor --

8 MR. DAVIS: We are. Neal Davis on behalf  
9 of Deel. We're on board with that.

10 MR. WILLIAMS: We're on board.

11 MR. FORD: We're not on board because of  
12 the Sixth Amendment issue, but I will say this tweet  
13 has specifically to do with this case and the tickers  
14 charged. My client is unequivocally advising people  
15 that if they are just starting out and they don't know  
16 yet how to trade, that they shouldn't use actual  
17 money. It's a reference to the tickers that are in  
18 the indictment.

19 MR. ARMSTRONG: Which one?

20 MR. FORD: It's CEI, DATS --

21 MR. ARMSTRONG: That's from 2010.

22 MR. FORD: -- ONTX and --

23 MR. ARMSTRONG: The year before CEI and  
24 DATS.

25 MR. FORD: Yeah, you're exactly right. It

11:28:44 1 was published. My client hasn't deleted any of his  
11:28:47 2 tweets. You can still see it today. This was what he  
11:28:49 3 would routinely post and it --

11:28:51 4 THE COURT: And why do you know it's  
11:28:52 5 related to that stock? Because what I see doesn't --

11:28:54 6 MR. ARMSTRONG: It's not. It's not, Your  
11:28:56 7 Honor. It is a year and a half before DATS and CEI.  
11:28:59 8 And so they're doing slight of hand again saying that  
11:29:02 9 this relates to --

11:29:03 10 THE COURT: Let's don't interrupt each  
11:29:05 11 other.

11:29:06 12 MR. ARMSTRONG: They're saying that it  
11:29:07 13 relates to specific tickers and they're not being  
11:29:09 14 accurate with the record. This is from November 2020  
11:29:11 15 and DATS and CEI are from 2021 in October.

11:29:17 16 MR. FORD: Well, Your Honor, he's  
11:29:19 17 obviously referring to any stocks that he discusses on  
11:29:23 18 his Twitter page, and it's not just one tweet buried  
11:29:27 19 among many. He does this routinely. You will see  
11:29:30 20 examples that are occurring during that time period of  
11:29:34 21 these imaginary episodes that the government made up.  
11:29:38 22 These are what was happening on Twitter.

11:29:38 23 THE COURT: Okay. I'm taking an aspirin  
11:51:27 24 break and I'll be back in 10 minutes. 15 minutes.

11:51:27 25 (Court in recess.)

12:05:13 1 THE COURT: From the government's  
12:05:14 2 standpoint, where do we start with your exhibits that  
12:05:18 3 don't have anything to do with Twitter?

12:05:25 4 MR. ARMSTRONG: Tough question, Your  
12:05:26 5 Honor. Let me check.

12:05:29 6 THE COURT: I'm trying to actually get  
12:05:31 7 something accomplished before lunch.

12:05:35 8 MR. ARMSTRONG: The Court's indulgence.

12:05:49 9 Your Honor, just for background, the way  
12:05:54 10 Government Exhibit 2 through 20 are just generally  
12:05:59 11 organized, is that there is a chart, which is the  
12:06:03 12 price and volume chart. There is the B chart, which  
12:06:06 13 is the summary chart. Then there's the C chart.

12:06:09 14 If you could please pull up 2C, please,  
12:06:11 15 Ms. Kim.

12:06:18 16 So for the substantive counts, we have  
12:06:21 17 themes and variation of this chart in 2C, which  
12:06:25 18 depicts -- I will also introduce through  
12:06:29 19 Ms. Garibotti -- that depicts the operative tweet  
12:06:34 20 and -- are you with me, Your Honor?

12:06:35 21 THE COURT: And that gets us to 20. If I  
12:06:37 22 ignore all these, that gets us to 20 what?

12:06:42 23 MR. ARMSTRONG: No, I'm sorry, Your Honor.  
12:06:42 24 So these are part and parcel of 1 through 20.

12:06:45 25 THE COURT: Okay.

MR. ARMSTRONG: And then 21 through 55 are additional summary charts of Ms. Garibotti.

So similar to the ones that we're talking about and have been talking about this morning. Then we pick up with messages. So these messages are statements of a party opponent. Under 801(d)(2)(e) -- I'm sorry -- 801(d)(2)(a). Or they're a statement of a co-conspirator under 801(d)(2)(e).

And so 56 through essentially -- essentially the end, with one caveat. For the victim trading records are the defendants' own statements or statements of co-conspirators that we collected, either from Twitter or Discord or Mr. Deel's phone. So there's no easy way to say that --

THE COURT: Well, 56 through what?

MR. ARMSTRONG: So 56 through 68, for example, are text messages from Mr. Deel's phone.

THE COURT: All right. Let's start there. Does anybody object to those?

MS. CORDOVA: Your Honor, on behalf of Mr. Hennessey, we object to Government Exhibit 56 because it relates to an episode that is outside the 54 trial episodes that the government has stated that they would refer to. What the government has done is they've cut off the text message chain -- and I have a

12:08:49 1 copy if that would be helpful.

12:09:07 2 THE COURT: Okay. I have it, counsel. Go  
12:09:08 3 ahead.

12:09:09 4 MS. CORDOVA: So what the government has  
12:09:10 5 done is they've cut off this text message chain just  
12:09:13 6 where my client, Mr. Hennessey, emphasized a message,  
12:09:17 7 which means he just put like a little exclamation  
12:09:21 8 mark, like a thumbs-up or a thumb-downs, where there's  
12:09:24 9 like a little exclamation mark you can put on a  
12:09:27 10 message. And what they've left out -- what they've  
12:09:37 11 left out of this text message chain is the ensuing  
12:09:40 12 conversation that discusses the stock that they  
12:09:44 13 decided to trade that day.

12:09:45 14 And why that's important is that the stock  
12:09:47 15 they decided to trade that day and -- I say "they," I  
12:09:52 16 mean, Ultra calls Gary Deel and Tommy Cooperman was  
12:10:00 17 EARS, E-A-R-S, and that is outside the scope of the 54  
12:10:06 18 trial episodes that the government has identified.

12:10:12 19 So what they're trying to do is show that  
12:10:13 20 my client was involved in talking about a stock they  
12:10:15 21 were going to trade, but then -- it's stock that's  
12:10:19 22 outside the 54, number one.

12:10:20 23 And then, number two, Mr. Hennessey never  
12:10:22 24 traded it.

12:10:25 25 So if they put this in, we would have to

12:10:28 1 put in all this stuff and then we're going way beyond  
12:10:30 2 the 54 episodes. So the government has repeatedly  
12:10:32 3 stated that they will not introduce evidence of  
12:10:35 4 wrongdoing outside the 54 episodes, but that's what  
12:10:38 5 this is.

12:10:38 6 Because it's about an episode that is  
12:10:40 7 outside the 54. And if they go into it, then we're  
12:10:43 8 going to have to go into that episode and I'm going to  
12:10:45 9 have to show the jury, look, my client never traded  
12:10:49 10 this episode. So the fact that people are talking  
12:10:51 11 about all this stuff, he never -- he was never  
12:10:52 12 involved.

12:10:56 13 MR. ARMSTRONG: Your Honor, a very simple  
12:11:03 14 response. The statement -- these text messages are  
12:11:06 15 not being offered for a specific ticker. It's being  
12:11:09 16 offered to prove the conspiracy and how the conspiracy  
12:11:13 17 worked.

12:11:13 18 On page 1 of Government's Exhibit 56,  
12:11:16 19 Mr. Deel says: Let's collaborate and send one  
12:11:19 20 tomorrow. And he's saying this to Mr. Hennessey and  
12:11:23 21 Mr. Rybarczyk. And then they talk about Mr. Cooperman  
12:11:27 22 on the bottom of the page. Now we do one together.

12:11:37 23 And then on page 3, Mr. Deel says: We put  
12:11:40 24 out one fire alert and we bail for real. Go silent.  
12:11:44 25 And that way each day people are waiting for us.

12:11:51 1 So, Your Honor, this just proves the kind  
12:11:55 2 of conversations that the defendants had among  
12:11:56 3 themselves. And it proves that they themselves,  
12:11:59 4 again, believed in the power of what they were doing.  
12:12:01 5 And the power and the impact that it had on the  
12:12:05 6 market.

12:12:05 7 These are the kinds of conversations that  
12:12:07 8 talk about the exact scheme, what we're going to do,  
12:12:11 9 how we're going to do it together, and how it's going  
12:12:13 10 to impact other people.

12:12:16 11 MS. CORDOVA: And, Your Honor, the  
12:12:20 12 government excised the part that demonstrates that my  
12:12:22 13 client actually didn't engage in any trading or  
12:12:25 14 trading that they were talking about in this.

12:12:27 15 And the other thing -- so there's multiple  
12:12:30 16 objections. That's the main one, this is outside the  
12:12:32 17 54. If we bring it in, we have to bring in all the  
12:12:34 18 evidence, the full exchange that talks about the stock  
12:12:38 19 they actually decided to trade that day and my client  
12:12:40 20 didn't trade it. So that's part of it.

12:12:41 21 The other thing is, is that we have the  
12:12:44 22 actual printout of the text messages. And it's very  
12:12:47 23 different from what the government has sort of copied  
12:12:49 24 and pasted together and put -- they put at the top of  
12:12:53 25 that exhibit, Mitch Hennessey. There's no evidence

12:12:57 1 that Mitchell Hennessey ever saw a tweet on the 2nd of  
12:13:01 2 June. He didn't text. He didn't respond. And this  
12:13:05 3 is a group chat, for all we know he had it silenced  
12:13:09 4 and he never viewed anything. He only emphasized one  
12:13:12 5 tweet on the 3rd.

12:13:13 6 And the government's -- the way they've  
12:13:15 7 put this together is it shows -- they've put at the  
12:13:17 8 top that it's June 2nd. But if you look closely --  
12:13:20 9 and you'll have to use the magnifying glass -- he  
12:13:23 10 actually doesn't even respond to anything until the  
12:13:24 11 3rd.

12:13:25 12 And then on the 3rd, after he emphasized  
12:13:27 13 it, then everyone -- other people, and I don't want to  
12:13:30 14 speak for other people -- but other people, not  
12:13:32 15 Mr. Hennessey, start talking about what stock they  
12:13:34 16 think would be good to trade. Mr. Hennessey never  
12:13:37 17 traded. And it's one of the stocks outside the 54.

12:13:39 18 So the government wants to put in half of  
12:13:41 19 it to make it show like these people are conspiring  
12:13:44 20 together. If they do that, we're going to have to go  
12:13:46 21 into the whole thing and then we're outside the 54,  
12:13:49 22 which is what they have promised over and over again  
12:13:51 23 they wouldn't do, but that's where we end up.

12:13:53 24 And it's also misleading for them to put  
12:13:56 25 the testimonial statement at the top, the date -- the



12:13:58 1 dates on the actual evidence. They could put the  
12:14:00 2 evidence in. So they can't put the date. It's also  
12:14:05 3 not accurate because didn't -- Mr. Hennessey wasn't  
12:14:08 4 part of the conversation on the 2nd; as well as  
12:14:10 5 Mr. Hennessey being a participant, because they have  
12:14:12 6 no evidence that he saw anything on the 2nd.

12:14:15 7 MR. ARMSTRONG: Your Honor, the standard  
12:14:16 8 is --

12:14:18 9 THE COURT: What other objections are  
12:14:20 10 there?

12:14:22 11 MR. ROSEN: Sure. We filed a motion about  
12:14:26 12 the co-conspirator statement, so Exhibit 59 falls  
12:14:30 13 within that motion. I'm happy to address one,  
12:14:33 14 multiple, or however you want to do it. I just wanted  
12:14:35 15 to make sure we preserve our objection to 59, which my  
12:14:38 16 client is not part of. There's a throwaway reference  
12:14:42 17 to him about pumping.

12:14:45 18 THE COURT: Okay. I'm missing this. 59  
12:14:47 19 what?

12:14:50 20 MR. ROSEN: Exhibit 59.

12:14:50 21 THE COURT: We're on 56.

12:14:54 22 MR. ROSEN: Right, right. Yeah. Weren't  
12:14:59 23 we doing this -- okay. Let me --

12:15:02 24 MR. BROWN: Your Honor, Matlock will just  
12:15:06 25 join the objection for outside of the scope of the 54

12:15:09 1 episodes.

12:15:13 2 THE COURT: Okay. How many of these are  
12:15:14 3 going to be outside of the 54?

12:15:18 4 MS. CORDOVA: Many.

12:15:19 5 MR. ARMSTRONG: Your Honor, we charged a  
12:15:20 6 conspiracy. We are allowed to prove the relationship  
12:15:22 7 between the parties. That is what we're doing.

12:15:25 8 THE COURT: I know, but I thought that was  
12:15:26 9 the purpose of the 54. The extra 35 were going to be  
12:15:32 10 concerning those to prove the conspiracy. I mean,  
12:15:37 11 that was the argument for the extra 35 and we're  
12:15:40 12 limiting that to the 54. And I didn't pick the 54  
12:15:43 13 number.

12:15:44 14 MR. ARMSTRONG: Of course.

12:15:45 15 THE COURT: But we were doing it to, you  
12:15:48 16 know, make it a case that was presentable to a jury  
12:15:50 17 and some time in the 2024 calendar year.

12:15:55 18 MR. ARMSTRONG: Your Honor, they've  
12:15:56 19 already made arguments that you cannot infer anything  
12:15:58 20 just based on trading alone. And so the fact that one  
12:16:02 21 defendant was trading in a stock with somebody else  
12:16:05 22 tells you nothing. These kind of private  
12:16:07 23 communications among themselves proves the conspiracy,  
12:16:10 24 and it proves the relationship between the parties.  
12:16:16 25 It proves exactly what they believed about their

12:16:18 1 messages they put into the market.

12:16:19 2 THE COURT: I'm not arguing with you about  
12:16:24 3 that. What I'm asking is, I thought we were limiting  
12:16:26 4 it to 54 stocks.

12:16:27 5 MR. ARMSTRONG: We are. Of course, Your  
12:16:28 6 Honor. And this doesn't have any reference to a stock  
12:16:30 7 on it. And so we're not pointing to some stock  
12:16:33 8 outside of our 54 in this exhibit.

12:16:36 9 THE COURT: Okay. But I'm hearing that if  
12:16:39 10 you read the whole thing, it's pertaining to another  
12:16:42 11 stock.

12:16:44 12 MR. ARMSTRONG: That may be true, Your  
12:16:44 13 Honor. And, again, it goes back to what we talked  
12:16:47 14 about before, before the break, which is if they're  
12:16:49 15 going to make a Rule of Completeness argument, they  
12:16:51 16 need to put their money where their mouth is and  
12:16:55 17 actually show what actually makes this incomplete for  
12:16:58 18 the reason that we're offering it. And they're just  
12:17:01 19 talking in the abstract to try to exclude things,  
12:17:03 20 which is improper.

12:17:08 21 MR. FORD: We're going to pull up an  
12:17:11 22 example just to elucidate what's happening a little  
12:17:13 23 bit more clearly.

12:17:15 24 MR. ARMSTRONG: Your Honor, if the Court  
12:17:16 25 would indulge me, Mr. Constantinescu is not even on

12:17:18 1 this tweet. If we could have some guidelines as to  
12:17:20 2 who can object to exhibits that we're actually  
12:17:22 3 discussing.

12:17:22 4 MS. EPLEY: I'd be happy to.

12:17:28 5 MR. FORD: So this is -- this is yet  
12:17:32 6 another example, and we're going to see dozens and  
12:17:35 7 dozen of these. And this one, this is the original  
12:17:38 8 data. They're attributing it to Mr. Hrvatin and  
12:17:42 9 Mr. Cooperman.

12:17:43 10 It says: We need GIX to do it.

12:17:46 11 So just to be clear, GIX is not even a  
12:17:48 12 registered security and, therefore, could not form the  
12:17:51 13 foundation of a charge under 1348 or 1349. It's a  
12:17:55 14 ticker not only outside of the episodes, but that  
12:17:57 15 could not possibly form the foundation.

12:17:59 16 Now, Mr. Hrvatin says: If we all load up,  
12:18:02 17 we can move anything; to which I believe Mr. Cooperman  
12:18:06 18 responds: I can bend the spoons with my mind, but  
12:18:10 19 only when I'm high.

12:18:12 20 Now, if you go back to the original -- it  
12:18:18 21 says: I also come up with business ideas when I'm  
12:18:20 22 high, but then I forget ha, ha.

12:18:22 23 If you go to the government's actual  
12:18:25 24 exhibit, they have only included the top three lines:  
12:18:28 25 We need GIX to do it. Giant game to follow. If we

12:18:32 1 load up we can move anything.

12:18:34 2 So while we understand this is  
12:18:36 3 cross-examination material, the problem here is GIX is  
12:18:39 4 outside of the episodes. It's not a registered ticker  
12:18:42 5 and the government has actually manipulated this  
12:18:45 6 conversation where people are joking to make it seem  
12:18:48 7 like there was some sort of misconduct.

12:18:51 8 THE COURT: They might be doing you a  
12:18:53 9 favor, keeping drug use out from in front of the jury.

12:18:55 10 MR. ARMSTRONG: Exactly. Does  
12:18:56 11 Mr. Hrvatin's attorney want us to introduce that he  
12:18:59 12 was high all the time? We're happy to do that if he  
12:19:00 13 wants to. We could stipulate to that.

12:19:01 14 MR. FORD: Mr. Hrvatin didn't say that,  
12:19:03 15 but -- nor did any of the co-defendants, which raises  
12:19:07 16 the other problem, which is we have dozens and dozens  
12:19:10 17 of these exhibits where there is people on them who  
12:19:14 18 I've never heard of and I don't know who they are. We  
12:19:17 19 just skipped past -- we skipped -- we fast forwarded  
12:19:20 20 to Exhibit 56 --

12:19:23 21 THE COURT: We did that at my request.

12:19:29 22 MR. FORD: But contained within those are  
12:19:31 23 other examples of what we're saying. By the way, this  
12:19:33 24 purports that Mr. Constantinescu, Mr. Matlock,  
12:19:36 25 Mr. Hrvatin, and Mr. Knight and other individuals were

12:19:38 1 part of this conversation. They don't appear anywhere  
12:19:40 2 on the government's exhibit.

12:19:43 3 They've just fabricated demonstratives  
12:19:45 4 where they've included the names of everybody on the  
12:19:47 5 top of the exhibit, without any evidence that anybody  
12:19:49 6 participated in the conversation.

12:19:51 7 MR. ARMSTRONG: Your Honor, again, that is  
12:19:52 8 a gross fabrication of the record. This is a Twitter  
12:19:54 9 group chat that all of the people that are listed on  
12:19:57 10 the header are in.

12:20:02 11 MR. FORD: Your Honor, so -- and I  
12:20:05 12 understand we've moved to Exhibit 56. But this is an  
12:20:08 13 endemic problem of using tickers outside of the 54.  
12:20:11 14 It's an endemic problem of relying on tickers that are  
12:20:14 15 not even --

12:20:14 16 THE COURT: All right. Let's go to an  
12:20:15 17 exhibit that's inside the 54 that the Court might  
12:20:18 18 actually admit.

12:20:20 19 MR. ARMSTRONG: So, Your Honor, the  
12:20:22 20 tickers in the 54, the relevant message for those  
12:20:31 21 tickers are in two places: Number one, they're  
12:20:36 22 embedded in the summary charts of Ms. Garibotti. And  
12:20:39 23 then the actual underlying record itself is normally  
12:20:42 24 attached as a C, D, or E after that -- knowledge.

12:20:46 25 THE COURT: Okay. Well, I'll come back to

12:20:47 1 those. But, I mean -- so none of these other exhibits  
12:20:49 2 have to do with any of the 54 stocks?

12:20:52 3 MR. ARMSTRONG: I'd have to go back and  
12:20:55 4 look. There may be one or two references to like SURF  
12:20:57 5 and RGLS off the top of my head, but, again, Your  
12:21:02 6 Honor, we really should go through these, because they  
12:21:04 7 provide critical context about the relationship to the  
12:21:06 8 parties. And they prove up the conspiracy that we  
12:21:09 9 have charged. And it shows that they were close  
12:21:12 10 associates and did this together.

12:21:16 11 THE COURT: Here's my problem with that,  
12:21:20 12 counsel, is I don't disagree with you that they show  
12:21:21 13 what you say they show. Or at least can be  
12:21:24 14 interpreted that way. At least the couple I've looked  
12:21:29 15 at.

12:21:30 16 But the problem is, I mean, we've had like  
12:21:33 17 three hearings where we're saying we're cutting it  
12:21:36 18 down to 54 stocks. And so defendants are prepared to  
12:21:39 19 address 54 stocks. And this one wasn't one of them.

12:21:43 20 MR. ARMSTRONG: Your Honor, we can  
12:21:44 21 stipulate that this one is not one of them. I mean,  
12:21:48 22 on Exhibit 56, the stock isn't even referenced in the  
12:21:51 23 excerpt that we're offering.

12:21:53 24 And so, again, we're arguing about an  
12:21:55 25 issue that we're not even offering the exhibit for.

12:21:58 1 We're not putting the trading at issue in Government  
12:22:02 2 Exhibit 56. Again, we're offering it to show  
12:22:07 3 something totally different, which is the relationship  
12:22:09 4 between the parties and how they believe they had the  
12:22:12 5 impact on the market, which is what we alleged.

12:22:18 6 MS. CORDOVA: Your Honor, they're offering  
12:22:20 7 it to show wrongdoing on the part of my client. And  
12:22:23 8 they said that there would not be evidence of  
12:22:26 9 wrongdoing outside the 54. Now, we can go into it and  
12:22:29 10 we can put the whole text message in and we can show  
12:22:31 11 the jury, look, Mitch never traded EARS. He didn't --  
12:22:36 12 he was in this text message, because he emphasized one  
12:22:39 13 thing, whether he saw the messages before or the  
12:22:41 14 messages after, we don't know, but we do know he never  
12:22:44 15 traded it.

12:22:44 16 It's just that is going to prolong this  
12:22:46 17 case and we -- the government told us in September  
12:22:49 18 these are the 54 we have to look forward to. These  
12:22:52 19 are the 54 we have to worry about. We would have a  
12:22:55 20 ton of work to do to get ready for all these other  
12:22:57 21 episodes and there are a lot.

12:22:59 22 MR. ARMSTRONG: Your Honor, there is no  
12:23:00 23 other episode. The statement is primarily being  
12:23:02 24 offered against Mr. Deel and his own words on the  
12:23:05 25 first two lines --



12:23:05 1 THE COURT: No, I understand why you're  
12:23:06 2 offering it. I mean, I think it's clear why you're  
12:23:09 3 offering it. But the question -- my problem is, it's  
12:23:14 4 outside the scope of what I thought everybody had  
12:23:17 5 agreed to.

12:23:19 6 MR. ARMSTRONG: Your Honor, I would really  
12:23:20 7 disagree with that statement. It's not outside the  
12:23:23 8 scope. It's offered for a completely different  
12:23:27 9 reason.

12:23:30 10 MR. DAVIS: Judge, Neal Davis for  
12:23:31 11 Mr. Deel. He's referring to my client.

12:23:32 12 We object because we've been prepared for  
12:23:34 13 the 54 episodes that we were told repeatedly were  
12:23:39 14 going to be possibly in play for a trial. I was  
12:23:43 15 hoping that we could maybe try this case in eight  
12:23:46 16 weeks or less.

12:23:48 17 At this point, if we're going to start  
12:23:50 18 going off -- because we went from the original charged  
12:23:53 19 ones to 54, because they wanted some more to throw in  
12:23:57 20 there. But now we're going beyond those. And it's  
12:23:59 21 just not fair.

12:24:01 22 I mean, I don't know how else to put it.  
12:24:03 23 And we're going to be here forever. So my request is  
12:24:07 24 that they be limited to the 54 charges. And under  
12:24:10 25 401, 403, these are the ones who are not --

12:24:15 1 MR. ARMSTRONG: Your Honor --

12:24:15 2 MR. DAVIS: Can I just finish? I haven't  
12:24:16 3 even talked in two days.

12:24:16 4 MR. ARMSTRONG: I apologize.

12:24:17 5 MR. DAVIS: I know. It's my client. It's  
12:24:19 6 my client and everyone has been talked but me. And --

12:24:24 7 So, anyway, Judge, Mr. Deel -- so I agree  
12:24:28 8 with the Court. And I just don't -- it's just seems  
12:24:32 9 bordering on the ridiculous, so...

12:24:36 10 MR. ARMSTRONG: Your Honor, if they're not  
12:24:37 11 going to argue that their statement didn't have an  
12:24:39 12 impact on the market, we can withdraw this exhibit,  
12:24:43 13 right.

12:24:43 14 But their whole argument is their tweets  
12:24:46 15 didn't move anything at all and that is directly  
12:24:48 16 contradicted by this exhibit. So that's why we're --

12:24:51 17 THE COURT: Didn't you say yesterday say  
12:24:53 18 you're not arguing -- the government is not arguing  
12:24:54 19 that the tweets made a difference? You're not arguing  
12:24:58 20 it made the price go up?

12:24:59 21 MR. ARMSTRONG: It made a difference to  
12:25:01 22 them and that's why they did it. And that's exactly  
12:25:03 23 what this proves. And we're going to have people  
12:25:07 24 testify who were doing this with them and observing it  
12:25:09 25 in realtime that the tweet would come out and the

12:25:12 1 price would pop.

12:25:15 2 MR. DAVIS: It's been a shifting target  
12:25:17 3 the entire time, not only the government's theory, but  
12:25:20 4 now exhibits. I mean, it depends on which hour of  
12:25:22 5 which day you ask the government what their theory is.

12:25:33 6 THE COURT: Okay. And am I understanding  
12:25:42 7 that 56 through 340 don't concern the 54 stocks?

12:25:49 8 MR. ARMSTRONG: Your Honor, for example,  
12:25:51 9 57 -- I mean, we can go through them if Your Honor  
12:25:52 10 would like. It's difficult to talk about this in the  
12:25:54 11 abstract.

12:25:55 12 Exhibit 57 is another critical point to  
12:25:58 13 the conspiracy. It's Mr. Hennessey this time in  
12:26:03 14 his -- I'll wait till you get there.

12:26:05 15 THE COURT: I've got it.

12:26:06 16 MR. ARMSTRONG: Here it's Mr. Hennessey in  
12:26:08 17 his own words talking to Mr. Cooperman and Mr. Deel in  
12:26:12 18 the middle of the conspiracy in 2021: There's legit  
12:26:16 19 no point in me alerting shit unless it's to help you  
12:26:19 20 guys.

12:26:19 21 That is the thrust of the conspiracy.  
12:26:23 22 They are alerting things to help themselves and then  
12:26:25 23 telling the followers: Hey, guys, we're looking out  
12:26:27 24 for you, you're our family, you can trust us.

12:26:30 25 In Mr. Hennessey's own words he explains

12:26:32 1 exactly why he alerts things: To help his  
12:26:35 2 co-conspirators.

12:26:42 3 THE COURT: Is this one of the 54 stocks  
12:26:43 4 they're talking about?

12:26:45 5 MR. ARMSTRONG: I have no idea, Your  
12:26:46 6 Honor. That's not the reason why we're offering it.

12:26:48 7 We're offering it, again, to show the  
12:26:50 8 relationship between the parties and how the  
12:26:52 9 conspiracy operated.

12:27:01 10 MR. ROSEN: One significant byproduct of  
12:27:03 11 the going outside the 54, and it does impact 54, my  
12:27:08 12 client's not on that. He's not on a lot of these.  
12:27:11 13 He's on actually very few. There's a real multiple  
12:27:14 14 conspiracy problem here. There are different groups  
12:27:15 15 breaking off, as my client is part of Sapphire, not  
12:27:18 16 being part of Atlas.

12:27:20 17 I mean, it's going to be chaos trying to  
12:27:23 18 figure out what conspiracy is this, who is part of the  
12:27:25 19 alleged conspiracy and how do you even define this to  
12:27:27 20 the jury.

12:27:27 21 So as we do go forward in these text  
12:27:30 22 messages, I just want to ask Your Honor to keep that  
12:27:31 23 in mind.

12:27:39 24 THE COURT: I'm concerned whether we're  
12:27:40 25 ready for trial.

12:27:40 1 MS. CORDOVA: Your Honor, we're ready.  
12:27:41 2 We're ready on the 54. We've spent a lot of time  
12:27:44 3 getting ready.

12:27:46 4 MR. ARMSTRONG: Your Honor, this is no  
12:27:47 5 surprise to anybody. This is what we alleged in the  
12:27:49 6 indictment. This is exactly how the conspiracy is  
12:27:52 7 working. This is exactly how --

12:27:53 8 THE COURT: Well, it's a surprise to me.  
12:27:55 9 Okay? Because I thought we were limiting testimony to  
12:27:59 10 54 stocks.

12:28:01 11 MR. DAVIS: And for the record, it's a  
12:28:01 12 surprise to me as well. I thought we were limiting it  
12:28:03 13 to 54. Ms. Cordova, I remember specifically said up  
12:28:06 14 here on several occasions, they're going to try to go  
12:28:08 15 outside the 54; the government said no. And it's in  
12:28:12 16 pleadings as well and here we are.

12:28:13 17 You know, this is not a very complicated  
12:28:17 18 case. It's a fraud case. It's a criminal fraud case.  
12:28:20 19 They've got plenty of allegations in the indictment  
12:28:23 20 they can rely on. They've got 54 other charges they  
12:28:26 21 can rely on. Now we've got to go beyond all that?

12:28:29 22 I mean, it's just -- to me, it's just not  
12:28:31 23 fair to the defense. And it's just a due process  
12:28:34 24 violation. It doesn't follow the Court's order.

12:28:49 25 MR. ARMSTRONG: Again, Your Honor, I can

12:28:50 1 give you more specific examples of why each one of  
12:28:52 2 these is critically relevant.

12:28:54 3 THE COURT: I'm not fussing you with about  
12:28:56 4 the relevance. I could see why you say, when he says,  
12:29:01 5 hey, let's get together and do X, I mean, that proves  
12:29:04 6 conspiracy. We're getting together and doing  
12:29:06 7 something. I understand the relevance.

12:29:09 8 It's the surprise factor that I'm not  
12:29:16 9 happy with.

12:29:19 10 MR. FORD: Your Honor, the surprise factor  
12:29:24 11 is based on the deficiencies in their case.

12:29:30 12 These -- one, these conversations do not  
12:29:32 13 support the notion of a conspiracy. Because what  
12:29:34 14 they're talking about is not unlawful conduct.

12:29:37 15 So I disagree with Your Honor in that  
12:29:39 16 regard. And we will stand prepared to present what  
12:29:44 17 they're actually talking about --

12:29:46 18 THE COURT: Well, I think that would be  
12:29:48 19 for the jury to decide, quite frankly.

12:29:48 20 MR. FORD: Exactly.

12:29:50 21 THE COURT: Set that part aside.

12:29:52 22 MR. FORD: Right. But what has happened  
12:29:55 23 in this case is they lack sufficient evidence to make  
12:30:01 24 a showing of a conspiracy.

12:30:03 25 So they've pieced together these disparate

12:30:07 1 conversations in groups. And it takes hundreds of  
12:30:10 2 individual irrelevant exhibits that are outside the  
12:30:12 3 scope of their case so that they can confuse the jury  
12:30:16 4 with sheer volume.

12:30:17 5 As you see, of the eight co-defendants, or  
12:30:24 6 nine in this case, six are not present in this  
12:30:25 7 conversation. And it appears to -- it appears to do  
12:30:31 8 with a stock that's been never mentioned before by the  
12:30:33 9 government.

12:30:34 10 On top of it, we are not talking about an  
12:30:36 11 18 U.S.C. 371 conspiracy where they can prove wrongful  
12:30:40 12 or lawful conduct. The plain language of 1349 is the  
12:30:44 13 conspiracy has to be -- the object has to be the  
12:30:47 14 commission of a 1348 offense.

12:30:49 15 And 1348 is expressly tied to a specific  
12:30:56 16 security registered under Rule 12 of the securities  
12:30:59 17 law. It's not a 371 conspiracy. They did not charge  
12:31:03 18 that.

12:31:06 19 This is the issue with them introducing,  
12:31:08 20 not only the additional 35 above the 19, but now  
12:31:11 21 trying to include hundreds of others, including the  
12:31:14 22 example I just showed of GIX, which is not even a  
12:31:17 23 registered security.

12:31:20 24 MR. ARMSTRONG: Your Honor, just very  
12:31:24 25 quickly, maybe this will eliminate the point. Maybe

12:31:24 1 not, but I'll give it to Your Honor.

12:31:26 2 Government Exhibit 77, please, Ms. Kim.

12:31:42 3 This is a critical exchange between

12:31:44 4 Mr. Hennessey and Mr. Constantinescu. It's from

12:31:46 5 Discord. And Mr. Constantinescu is teaching

12:31:51 6 Mr. Hennessey exactly what to do.

12:31:53 7 And it's not being offered for any

12:31:55 8 specific ticker. It doesn't reference a specific

12:31:59 9 ticker. But, lo and behold, what happens here is that

12:32:01 10 they do this exact thing with ONTX one month later.

12:32:04 11 So, again, it's critical evidence that

12:32:07 12 explains exactly what we charged.

12:32:10 13 MR. FORD: Your Honor, under Rule 106,

12:32:12 14 Rule of Completeness, when the jury sees this, we will

12:32:15 15 show that full exchange where you will see that this

12:32:18 16 is surrounded by ha, ha, ha, ha and they quote to a

12:32:24 17 link to an individual, who is not a party to this

12:32:28 18 case, who has posted on Discord saying: Hey, please

12:32:31 19 come join my paid chatroom, and I will give you the

12:32:36 20 best alerts. And if you do it by today at 4 p.m.,

12:32:41 21 I'll give you a discount on it.

12:32:42 22 So they forward this link to one another,

12:32:44 23 and then they're commenting on it by saying: Isn't

12:32:47 24 this hilarious? This guy is charging you money to go

12:32:49 25 to his room. But we all know he's going to front-load



1 and do these stocks. They're not referring to what  
2 they're doing. They're making fun of an individual  
3 who charges people money.

4 It was the function of the Atlas Discord  
5 room that Mr. Matlock and Constantinescu created, the  
6 purpose of it was to essentially push back and beat  
7 back these individuals who were using paid chatrooms  
8 in order to con people. They are making fun of that  
9 process.

10 It was the function of the creating a free  
11 chatroom. It is absolutely unbelievable that we are  
12 required under Rule 106 to introduce this complete  
13 statement and that the government is being allowed to  
14 pull out the context of the laughter and joking and  
15 citing to websites and so forth.

16 We can certainly pull it and show you --

17 MR. ARMSTRONG: Hey, Your Honor, I think  
18 we should do that. I think we should do that. It  
19 would be very helpful for everybody.

20 THE COURT: Let me say before you start  
21 that I view general conversations, not about any stock  
22 but about what we're doing, I don't view those in the  
23 same way that I view the non-54 stocks. So I don't  
24 consider those surprises.

25 MR. ARMSTRONG: I'm sorry, Your Honor, I

12:34:14 1 didn't follow.

12:34:15 2 THE COURT: Well, if you've got evidence  
12:34:17 3 that doesn't pertain to one of the non-54 stocks, but  
12:34:27 4 doesn't pertain to any stock in particular, like  
12:34:29 5 that's what I understood you to say, that this exhibit  
12:34:33 6 didn't pertain to any stock, it was just general  
12:34:36 7 chit-chat.

12:34:39 8 And it's -- if they're huddling up saying,  
12:34:43 9 let's get together and I'll buy this stock on the QT  
12:34:47 10 and then pump it up and sell it, that's not a  
12:34:51 11 surprise. I see that differently because that's just  
12:34:56 12 a general statement in furtherance of the conspiracy  
12:34:59 13 and I think that is fine.

12:35:02 14 My problem was with statements about  
12:35:06 15 stocks that we told the defendants that weren't in  
12:35:11 16 play.

12:35:11 17 MR. ARMSTRONG: But, again, Your Honor,  
12:35:12 18 just to make sure we're on the same page, we can  
12:35:17 19 excise any reference to another stock. I don't think  
12:35:20 20 they are a lot of them. There might be, like, one or  
12:35:22 21 two. But, again, it goes to the reason why Your Honor  
12:35:26 22 just explained. It doesn't go to the underlying  
12:35:29 23 trading and so --

12:35:29 24 THE COURT: No. I understand why you want  
12:35:31 25 it. I'd want it too if I was in your shoes.

12:35:37 1 MR. FORD: Your Honor, not only does this  
12:35:38 2 conversation not pertain to a particular stock, it is  
12:35:42 3 specifically mocking an individual who has a paid  
12:35:44 4 chatroom.

12:35:45 5 THE COURT: Well, that's a different  
12:35:46 6 topic.

12:35:48 7 MR. FORD: Well, no, it's the same that in  
12:35:49 8 the sense that if we're limiting the ruling to these  
12:35:51 9 conversations have to do with, hey, let's get together  
12:35:54 10 and do this one of the 54, then this conversation does  
12:35:57 11 not pertain to that. It must be excluded under that  
12:36:01 12 ruling.

12:36:01 13 THE COURT: Well, I mean, I've -- letting  
12:36:07 14 in the entire thing is a different animal, a different  
12:36:10 15 objection. Right now I'm talking about relevance.  
12:36:16 16 And by relevance I don't mean relevance to the cause  
12:36:18 17 of action, I mean relevance to the 54 stocks and/or  
12:36:23 18 the conspiracy with regard to those 54 stocks.

12:36:27 19 MR. FORD: Understood. Then the  
12:36:28 20 government should bear the burden of having to prove  
12:36:30 21 that this conversation concerns one of the 54 tickers.  
12:36:34 22 It does not. They can't.

12:36:48 23 MR. ARMSTRONG: So, Your Honor, Ms. Kim  
12:36:49 24 has pulled up the original, like, what we call the  
12:36:51 25 native Government Exhibit 77. And so you see --

12:37:03 1 MR. WILLIAMS: What number was that? I  
12:37:06 2 couldn't hear.

12:37:06 3 MR. ARMSTRONG: Government's Exhibit 77.

12:37:07 4 MR. WILLIAMS: 77. Thank you.

12:37:09 5 MR. ARMSTRONG: Here are the messages that  
12:37:11 6 we included: Dude, this is the plan from now on. We  
12:37:14 7 load quietly everything on the cheap and alert days  
12:37:18 8 later.

12:37:18 9 Mr. Hennessey says: Yes. No scanner  
12:37:21 10 pickups. Nope. No big leaps of us loading.

12:37:26 11 THE COURT: Give me your interpretation of  
12:37:28 12 no scanner pickups, just for my own edification.

12:37:32 13 MR. ARMSTRONG: Of course. So what  
12:37:33 14 happens is there are people out there that monitor  
12:37:36 15 just the buys and the sells of stocks.

12:37:38 16 THE COURT: Okay.

12:37:39 17 MR. ARMSTRONG: And so if someone places a  
12:37:41 18 large order to buy, that could be alerted in what's  
12:37:44 19 called a scanner, where someone just sees a general  
12:37:47 20 activity and they see an uptick in activity in a  
12:37:51 21 specific stock.

12:37:52 22 So the scanner will pick up a large buy as  
12:37:55 23 an indicator of a large interest. And so they'll  
12:37:59 24 break up their buys to not alert their scanners so  
12:38:02 25 other people wouldn't buy as a result.

12:38:05 1 But the point of this is that -- again,  
12:38:07 2 this happens a lot -- there is no reference to what  
12:38:09 3 Mr. Ford is talking about. So we can scroll down.  
12:38:14 4 The reason why it's offered is for one specific  
12:38:16 5 reason.

12:38:17 6 MR. FORD: The reference is right there.  
12:38:20 7 Ha, ha, ha, ha, ha, Dog. Video about it. I watched  
12:38:25 8 it 100 times. I know, lol. And then the citation to  
12:38:29 9 that link, twitter.com/ -- it lists a name, it says  
12:38:34 10 status and lists a series of numbers.

12:38:35 11 Now, the government claims that they can't  
12:38:37 12 obtain that link. But they can obtain that link. We  
12:38:40 13 have it. We'll pull it up for you. It's available on  
12:38:42 14 Wayback Machine. And it is a link to an individual  
12:38:46 15 who is suggesting that if you, by 4 p.m., join his  
12:38:52 16 chatroom, he will give you a discount on the price  
12:38:55 17 that it cost to join that chatroom.

12:38:57 18 I understand, Your Honor, that these are  
12:38:59 19 competing interpretations of the conversation. We  
12:39:03 20 certainly disagree with how they're using "scanner."

12:39:06 21 But the context of this occasion is a joke  
12:39:11 22 in relation to this individual. It happens all within  
12:39:15 23 a span of a couple minutes. This conversation occurs  
12:39:19 24 over a period of less than five minutes.

12:39:23 25 It's the next link down, if we go down to

12:39:27 1 this one at 12:07:49. I know, lol. And then the link  
12:39:37 2 underneath that, when you click on that link, it will  
12:39:40 3 go to a Twitter post where an individual is promoting  
12:39:45 4 a page. It is one of the fundamental aspects of our  
12:39:50 5 defense in this case.

12:39:51 6 But to answer the question, this is what  
12:39:57 7 it would look like if you tried to go to Twitter. So  
12:39:59 8 the government has said that it's unavailable, but you  
12:39:59 9 are --

12:39:59 10 (Counsel speaking simultaneously.)

12:40:07 11 MR. FORD: -- you are able to obtain this  
12:40:08 12 simply by going to Wayback Machine, and so we --

12:40:13 13 THE COURT: So we get the joker? Is that  
12:40:15 14 what you're telling me?

12:40:18 15 MR. FORD: Well, yeah. We're -- can we --

12:40:20 16 THE COURT: No. There's a video of the  
12:40:21 17 joker on the --

12:40:24 18 MR. FORD: Yeah. Well, my client was  
12:40:25 19 certainly a jokester. I'm going to pass something  
12:40:28 20 back to you. We won't be able to put it on the  
12:40:31 21 screen, but that's okay.

12:40:47 22 The function and purpose of Atlas  
12:40:50 23 Discord -- and I'm not saying it was directed at this  
12:40:52 24 individual, but the function of creating a free  
12:40:54 25 chatroom with free advice was to get people out of the

12:40:56 1 paid chatroom who they believed they were taking  
12:40:59 2 advantage of them. And so that is the joke. And that  
12:41:01 3 is what they are talking about in this context.

12:41:04 4 But, again, it has nothing to do with the  
12:41:07 5 general conspiracy. And it has nothing to do with any  
12:41:10 6 of the 54 stock tickers that we prepared. This is,  
12:41:14 7 again, this is endemic, Your Honor. We're going to  
12:41:16 8 see this in I think literally hundreds of exhibits  
12:41:18 9 coming up here that they have nothing to do with the  
12:41:22 10 case as we've prepared for.

12:41:25 11 MR. ARMSTRONG: Your Honor, Mr. Gentile in  
12:41:26 12 this tweet has nothing to do with this case.

12:41:26 13 THE COURT: I'm sorry?

12:41:28 14 MR. ARMSTRONG: Mr. Gentile --

12:41:30 15 MR. FORD: Yeah, Mr. --

12:41:30 16 MR. ARMSTRONG: Excuse me, sir.

12:41:32 17 MR. FORD: Can we not use the name of the  
12:41:35 18 individual?

12:41:36 19 MR. ARMSTRONG: It's on his Twitter  
12:41:38 20 profile.

12:41:39 21 MR. FORD: I understand that. He also  
12:41:41 22 happens to -- it is not relevant to this conversation  
12:41:44 23 to put the individual on record. And I would --

12:41:45 24 THE COURT: It may be relevant to me  
12:41:47 25 understanding.

12:41:47 1 Go ahead.

12:41:48 2 MR. ARMSTRONG: I don't understand what  
12:41:49 3 that objection is, but regardless --

12:41:55 4 MR. FORD: To the extent --

12:41:56 5 (Parties speaking simultaneously.)

12:41:57 6 THE COURT: Let the government finish.

12:41:59 7 MR. FORD: Can we seal -- if we're going  
12:42:00 8 to use his name, can we please seal it?

12:42:02 9 MR. ARMSTRONG: Why? It's supposedly a  
12:42:04 10 matter of public record.

12:42:05 11 MR. FORD: I will explain it at sidebar.

12:42:09 12 THE COURT: What were you going to say  
12:42:10 13 about the tweet?

12:42:12 14 MR. ARMSTRONG: The issue about what  
12:42:13 15 someone else is doing, at best, if we're being the  
12:42:18 16 most generous, goes to the weight of what we're  
12:42:22 17 offering, Your Honor. And we're offering the  
12:42:25 18 defendants' own words about what they're planning to  
12:42:29 19 do and, in fact, do do over and over and over again.

12:42:33 20 The fact that they may joke and make a  
12:42:36 21 stream of consciousness about someone else a little  
12:42:39 22 bit later does not negate the purpose of why we are  
12:42:41 23 offering it.

12:42:48 24 And if we're going to shave arguments  
12:42:49 25 about weight as to every single exhibit, we'll be here



12:42:52 1 until December. We have to actually make some  
12:42:55 2 rulings, respectfully, about statements being  
12:42:57 3 non-hearsay and admissible.

12:43:00 4 MR. FORD: The argument we're making is  
12:43:01 5 not about weight. The argument we're making is this  
12:43:04 6 doesn't have to do with the 54. It doesn't even have  
12:43:06 7 to do with a stock ticker. And with reference -- I  
12:43:08 8 would just ask, again, if we could sidebar on the  
12:43:11 9 issue of sealing the name of this individual.

12:43:17 10 THE COURT: Come up.

12:43:17 11 (The following proceedings held at sidebar.)

12:43:23 12 MR. FORD: He's -- one, he's one of my  
12:43:27 13 clients.

12:43:28 14 Two, he's a former government informant  
12:43:32 15 and agent who worked for many years who worked for the  
12:43:35 16 FBI and SEC.

12:43:36 17 It's not a conflict issue. But, I mean,  
12:43:39 18 it's in the public realm that he served as an  
12:43:42 19 informant for many, many years for the FBI. That's  
12:43:44 20 why I was just concerned about -- I don't want his  
12:43:47 21 name appearing in the record, but they are -- that's  
12:43:52 22 what they're saying.

12:43:52 23 MR. ARMSTRONG: For the record, I believe  
12:43:52 24 he was charged with securities fraud as well.

12:43:55 25 MR. FORD: Well, I just said he was a

12:43:56 1 client of mine. He was arrested and served as an  
12:43:56 2 FBI --

12:44:00 3 MR. ARMSTRONG: Sorry.

12:44:00 4 THE COURT: That goes without saying.

12:44:01 5 MR. FORD: That's the point. They're  
12:44:03 6 aware of him being charged. If you join by, you know,  
12:44:16 7 4 p.m. I'll give you a discount. These guys are  
12:44:20 8 making fun of him, suggesting that what he's doing is  
12:44:22 9 he's going to front load the followers. That's the  
12:44:24 10 context. But it has nothing to do with the 54.

12:44:27 11 THE COURT: No. That's your  
12:44:27 12 interpretation, though. But the government has a  
12:44:30 13 different interpretation of him.

12:44:32 14 MR. FORD: But it has nothing to do  
12:44:34 15 with -- look at the time period. There's not even any  
12:44:36 16 substantive charges against my client in that time  
12:44:39 17 period. It's before. And if it's relevant to the  
12:44:42 18 conspiracy, then it should be limited to the 54.

12:44:46 19 So this conversation -- that was -- I just  
12:44:48 20 wanted to sidebar. We can move this back out. We  
12:44:51 21 don't have to have the argument up here, Your Honor.

12:44:53 22 THE COURT: Okay.

12:44:54 23 (The following proceedings held in open court.)

12:45:02 24 MR. DAVIS: I'm trying to understand all  
12:45:04 25 this. I'm a big picture person. What I thought we

12:45:07 1 were dealing with were 54 stocks. And that's -- as a  
12:45:11 2 trial lawyer, that's what I've prepared for. We can  
12:45:14 3 get in the weeds of what all these texts say and  
12:45:17 4 everything, but if they're not tethered to the 54  
12:45:19 5 stocks, I don't think it's fair.

12:45:20 6 Now, I understand the Court's position as  
12:45:24 7 well. How many of these texts are tethered to the 54  
12:45:27 8 stocks and how many aren't. The government, frankly,  
12:45:29 9 doesn't have an answer at this point. They'll  
12:45:31 10 probably have to figure it out.

12:45:32 11 The second point the Court makes is, well,  
12:45:33 12 why can't we just introduce general chatter that  
12:45:36 13 doesn't have to do with some stock outside the 54. I  
12:45:40 14 think that's really difficult. Because almost all  
12:45:42 15 these chats are usually tethered to some kind of stock  
12:45:45 16 at play. But assuming they're not, then you have a  
12:45:52 17 miniature trial involving optional completeness and  
12:45:52 18 bringing in the context of this conversation.

12:45:55 19 I mean, doesn't the government have this  
12:45:57 20 evidence in the 54 they've charged? He said they say  
12:45:59 21 over and over again here is what we're going to do.  
12:46:01 22 Why do we need to go into this, then? It's just --

12:46:06 23 MR. ARMSTRONG: Your Honor --

12:46:08 24 MR. DAVIS: Oh, no. That's okay. I  
12:46:08 25 just -- if I'm frustrated, it's because I really -- my

12:46:10 1 client and I really want to try this case and this is  
12:46:13 2 what we've prepared for and not all these other  
12:46:15 3 things.

12:46:15 4 And we have objected to them last week and  
12:46:20 5 had a meet and confer. So we've made our position on  
12:46:20 6 it.

12:46:24 7 Thank you, Judge.

12:46:24 8 MR. ARMSTRONG: Your Honor, just one last  
12:46:24 9 point on this. This idea that people are supposedly  
12:46:28 10 surprised by communications between and among  
12:46:33 11 co-conspirators cannot be more farfetched. We  
12:46:38 12 literally cite to some of these conversations in the  
12:46:42 13 indictment.

12:46:43 14 So paragraph 17, we have Mr. Sabo talking  
12:46:47 15 with Mr. Matlock about how the conspiracy is working  
12:46:50 16 and why it's a problematic. That's paragraph 17.

12:46:53 17 So there's no surprise that conversations  
12:46:56 18 like these are going to be actually at issue in this  
12:47:00 19 case.

12:47:01 20 Paragraph 18, exact same thing.  
12:47:04 21 Mr. Constantinescu and Mr. Matlock. We got to look  
12:47:08 22 less obvious. It looks like we're front loading.

12:47:11 23 So this idea that somehow every  
12:47:13 24 conversation had to be tethered to a 54-trial episode  
12:47:16 25 is just a total fiction. And it is belied by the

1 indictment that has been on the record for a year and  
2 a half at this point.

3 MR. DAVIS: Well, we're certainly able to  
4 respond to what's in the indictment. The problem is  
5 there's a whole heck of a lot more here that is way  
6 beyond the indictment.

7 And so I just think that the Court should  
8 limit them to the 54 that are involved here or I think  
9 we face being in a very, very long trial and trying to  
10 complete conversations for outside the 54 stocks that  
11 I would expect wouldn't be necessary in this case,  
12 because the government, I would hope, would have the  
13 proof on the 54, if not the 19, so...

14 And as much as general due process.

15 MR. ROSEN: To me this just illustrates  
16 the core of the problem is a lot of these  
17 conversations have nothing to do with depriving  
18 victims of money or property. I think if we dismiss  
19 pursuant to *Ciminelli* and they reindict with actual  
20 stocks that they can at least allege that they show  
21 have deprived victims of money or property, we'll be  
22 back here whenever with a much tighter, smaller case  
23 where we know exactly what the evidence is. And  
24 there'll be at least a cognizant crime on the horizon.

25 MR. ARMSTRONG: Your Honor, again, we can

12:48:44 1 go through it. Having these kinds of statements just  
12:48:47 2 made in the abstract, not terribly helpful to anybody  
12:48:49 3 because we actually have on our exhibit list  
12:48:51 4 conversations between and among people like  
12:48:54 5 Mr. Matlock and Mr. Sabo where they are talking about  
12:48:58 6 Mr. Deel's and Mr. Cooperman's pump and dumps. They  
12:49:02 7 use those exact words. And how those pump and dumps  
12:49:06 8 break someone's account.

12:49:07 9 And we can wax all we want in the  
12:49:08 10 abstract. When we go back to the record, we have the  
12:49:10 11 proof to back it up. And we're trying to introduce  
12:49:13 12 the defendants' own statements to prove that.

12:49:20 13 THE COURT: Needless to say, I'm a little  
12:49:22 14 frustrated where we are right now. Let's take a lunch  
12:49:25 15 break. Let's be back in about 45 minutes. I do want  
12:49:29 16 to visit about something Mr. Rosen alluded to when we  
12:49:33 17 get back, but let's come back in 45 minutes.

12:49:37 18 (Court in recess.)

13:57:21 19 THE COURT: All right. Be seated.

13:57:28 20 As I said earlier, I was going to, when we  
13:57:32 21 came back, harken on to something Mr. Rosen had  
13:57:37 22 brought up. Only it's not the exact issue you brought  
13:57:39 23 up that I want to talk about, or I want you guys to  
13:57:43 24 talk about.

13:57:45 25 Mr. Rosen, you said, Judge, you're out of

13:57:47 1 this box if you grant our motion to dismiss out of --  
13:57:54 2 based on *Greenlaw*. I want to hear your argument. I  
13:57:59 3 mean, you made your *Greenlaw* argument yesterday, I've  
13:58:01 4 heard it. I want to hear your *Ciminelli* argument, or  
13:58:07 5 from whomever else, and why the allegations here --  
13:58:17 6 and, obviously, I expect Mr. Armstrong to come back  
13:58:21 7 strong and say absolutely not -- why these aren't just  
13:58:27 8 like what the Second Circuit got reversed on. You  
13:58:31 9 know, the right for information.

13:58:34 10 MR. ROSEN: Right. *Ciminelli* ultimately  
13:58:46 11 was about the right to perfect economic information or  
13:58:50 12 even true economic information in making discretionary  
13:58:54 13 economic determinations of what to do, what  
13:58:57 14 transactions to enter into.

13:59:00 15 THE COURT: Which they put under umbrella  
13:59:02 16 called right to control.

13:59:04 17 MR. ROSEN: The right to control.

13:59:05 18 Is that a traditional property right or  
13:59:07 19 not? It was phrased under the property rights -- you  
13:59:10 20 know, they went back and looked at wire fraud from its  
13:59:12 21 inception and mail fraud from its inception and, you  
13:59:15 22 know, made the determination that it only protects  
13:59:17 23 traditional property rights. Money, sometimes  
13:59:20 24 intellectual property, and things like that.

13:59:23 25 But what it doesn't do, it doesn't provide

1 an obligation for people to provide either their  
2 listeners, the people that are decision-makers with  
3 all the information that they need to make  
4 discretionary economic decisions with their money.

5 And that's exactly what this case is.  
6 That's how it was charged. They're talking about  
7 false and misleading statements. But they're really  
8 talking about omissions. You did not tell the Twitter  
9 followers that you were selling stock when you were  
10 buying.

11 And that's exactly what -- that's exactly  
12 what *Ciminelli* was really about. It's a -- you know,  
13 the fact is that people, to the extent -- you know,  
14 they're, as we saw in the 302 reports, but also as  
15 laid out in the indictment, people wanted to know what  
16 are defendants -- what my defendant was doing, what  
17 trades was he executing. And they just don't have the  
18 right under the criminal laws to that economic  
19 information. It's not a property right that they  
20 have.

21 And it makes sense. You're a Twitter  
22 follower. You have no connection with my client.  
23 You're not paying him any money. He has no fiduciary  
24 duty to you. He's tweeting out ideas about what  
25 potentially you should invest in. And sure, of



14:00:36 1 course, you want more information. You want to be  
14:00:38 2 able to track his buys and sells to the T because he's  
14:00:46 3 making money. And that's fine. You -- that's  
14:00:47 4 something you would want -- that's something I would  
14:00:49 5 want.

14:00:51 6 It's just not a traditional property right  
14:00:52 7 that is controlled. That the Supreme Court has deemed  
14:00:57 8 false under the wire or mail fraud and securities  
14:01:01 9 fraud statutes, too. Because 1348 is, you know,  
14:01:04 10 fairly identical to wire, mail and bank fraud, as we  
14:01:08 11 pointed out in our briefs.

14:01:09 12 Now, you sort of -- you know, how does  
14:01:12 13 that differ from the traditional pump and dump? Well,  
14:01:16 14 you know, you look at it two ways: *Greenlaw* is very  
14:01:18 15 precise. Well, is lying enough? So let's accept the  
14:01:22 16 government's theory that everything that they were  
14:01:24 17 saying is a lie. And the answer is no. *Greenlaw* said  
14:01:29 18 no. You have to have this intent to cheat, to deceive  
14:01:33 19 people.

14:01:34 20 So even if the government is right that  
14:01:36 21 what they were saying was not true, how do you prove  
14:01:39 22 that someone was intending to deceive or cheat people?  
14:01:43 23 Because they're intending to deceit people out of  
14:01:46 24 money or property. And that's exactly what we don't  
14:01:48 25 have here.

14:01:48 1 The indictment goes through every single  
14:01:52 2 ticker. This is what these guys made from trading in  
14:01:56 3 that stock. Garibotti: This is what they made from  
14:01:59 4 trading in that stock.

14:02:01 5 There's no allegations that I'm aware  
14:02:02 6 of -- and the government has effectively conceded  
14:02:03 7 this -- that any of that came from victims. Who would  
14:02:08 8 a victim -- I don't even know who a victim would be.  
14:02:09 9 It would be a person who, I guess, bought a stock  
14:02:14 10 solely based on their recommendations, disregarding  
14:02:16 11 all the disclaimers.

14:02:18 12 The stock then, you know, they were  
14:02:20 13 waiting around for someone to tell them personally  
14:02:23 14 when to sell. Even though if you look at the  
14:02:26 15 defendant's Twitter accounts, they don't tell people  
14:02:29 16 when to sell. So they're waiting for this new  
14:02:32 17 information that just is provided to them and their  
14:02:34 18 followers about this one particular stock.

14:02:37 19 And then they didn't sell at the right  
14:02:39 20 time. And then the stock didn't go back up after  
14:02:42 21 maybe it had gone down. So all those things, those  
14:02:45 22 stars have to align. And that's what they need to  
14:02:50 23 prove.

14:02:50 24 That's why I'm saying, like, if you  
14:02:52 25 dismiss it, I don't think they'll be able to allege

14:02:54 1 that they are actually victims who have lost money or  
14:02:57 2 property here. They certainly probably lost that  
14:03:04 3 discretionary economic decision-making power, but they  
14:03:05 4 didn't lose money or property.

14:03:06 5 And the government will set up -- get up  
14:03:08 6 here and, well, that's how it was alleged. You know,  
14:03:09 7 we say money or property in the indictment and that's  
14:03:11 8 fine. But, you know, I pointed out in our brief,  
14:03:15 9 there's a case in the Eastern District of New York,  
14:03:16 10 the *Nordlicht* case. And it doesn't matter exactly how  
14:03:21 11 it's charged, what matters is the actual allegations  
14:03:23 12 in indictment and what's shown.

14:03:26 13 And the Court said the only way this could  
14:03:28 14 have made sense is that the defendants in that case  
14:03:30 15 were deprived of economic -- the information to make  
14:03:33 16 the best economic decision-makers. In this case,  
14:03:36 17 information on when our clients were actually selling  
14:03:39 18 their stock.

14:03:40 19 And that's all this case is about. That's  
14:03:43 20 why -- that's what we're going to show, are defenses  
14:03:47 21 about the deception, the cheating, the getting money  
14:03:49 22 from these victims. And they can't show that. The  
14:03:51 23 people that they've brought on -- and some of them I  
14:03:54 24 feel like they weren't doing wise things with their  
14:03:57 25 money, a lot of them -- like, they didn't look at when

14:04:00 1 the stock went up. They didn't look when -- you know,  
14:04:02 2 when there were peaks or troughs or anything. They  
14:04:05 3 just held on for like no apparent good reason, but not  
14:04:09 4 due to our guys. Our guys weren't saying you should  
14:04:11 5 hold on. Like, days or weeks had passed.

14:04:14 6 One guy, this weatherman from Boston, had  
14:04:17 7 bought CEI in September of 2021. He would have -- if  
14:04:23 8 he had -- the stock then went up significantly, not  
14:04:25 9 due to -- I don't think due to any of these  
14:04:28 10 defendants. My client's not really in that one. So I  
14:04:31 11 don't know quite as well as the others.

14:04:32 12 But then there's a short -- so he would  
14:04:35 13 have tripled his money if he had properly executed a  
14:04:41 14 day trade. He didn't fine.

14:04:43 15 Then there was a short report issued by a  
14:04:46 16 hedge fund, Carousel Capital, that completely tanked  
14:04:51 17 the stock. And that's charged as one of the 54  
14:04:53 18 episodes.

14:04:54 19 I just -- how could that possibly say that  
14:04:56 20 our guys are the cause of his -- and then he held on  
14:04:59 21 for the next two years. It's like, you know, and he's  
14:05:03 22 a victim.

14:05:04 23 And there's no way they could ever prove  
14:05:07 24 that our guys tweeting about it on one day or two  
14:05:11 25 days, and then this massive short report that

14:05:13 1 completely destroyed the stock, but somehow yet our  
14:05:17 2 guys took money and property from that guy. No. He  
14:05:20 3 wanted -- it's the discretionary economic information.

14:05:22 4 In his case, it's that this rogue hedge  
14:05:26 5 fund, which actually appears in the FINRA reports, was  
14:05:29 6 short selling. And then while they were building this  
14:05:32 7 short report and then dumped all their shares -- and  
14:05:34 8 then repurchased all their shares back, when the  
14:05:37 9 shares predictably tanked, but it's not just our guys.

14:05:42 10 And that's why it's -- I keep emphasizing  
14:05:43 11 over and over again as a broken record, that's why  
14:05:45 12 this is different from the traditional pump and dump.

14:05:47 13 In the traditional pump and dump, there's  
14:05:49 14 a control group of people, control all those shares of  
14:05:53 15 stock. There is no real company. Everything that  
14:05:55 16 they do is a loss to other people. Once they stop  
14:05:58 17 pumping, the music stops and the shares go from them,  
14:06:03 18 you know, during the pump, held all by them, to these  
14:06:07 19 people who are purchasing it based on false and  
14:06:09 20 misleading information.

14:06:10 21 And then they just end. Because they're  
14:06:12 22 like these microcap private reverse mergers into these  
14:06:16 23 shell companies. There's nothing real about them. So  
14:06:18 24 you can say easily, okay, there was a scheme to  
14:06:21 25 deprive others -- victims of money or property.

14:06:25 1 Here, you just don't have that. And  
14:06:26 2 that's why it's like -- this is such a novel case,  
14:06:28 3 because frequently, you know, we built -- we built all  
14:06:32 4 these charts up with our experts showing, like,  
14:06:34 5 reactions to tweets up and down. It's like they  
14:06:36 6 didn't control anything. They didn't control the  
14:06:39 7 destiny of these stocks. Sometimes, you know, they're  
14:06:41 8 saying that my client tweeted and then sold, yeah,  
14:06:44 9 because the stock went down 20 cents and that was his  
14:06:47 10 stop loss --

14:06:47 11 THE COURT: That may be factual --

14:06:47 12 MR. ROSEN: Right.

14:06:49 13 THE COURT: -- factually correct. But can  
14:06:53 14 I look at that in the context of a mission to dismiss?

14:06:53 15 MR. ROSEN: Of course -- well, you -- the  
14:07:00 16 key -- but what I'm talking about are the facts  
14:07:02 17 surrounding the allegations in the indictment. The  
14:07:04 18 facts are, as pled, we walked through GTT yesterday  
14:07:08 19 and you walked through every one of those tickers.  
14:07:10 20 They don't say people actually lost -- victims lost  
14:07:14 21 money or property because of what our defendants did  
14:07:17 22 or the -- or anything like that, false and misleading  
14:07:20 23 statements. What they do tally up are profits made.

14:07:24 24 But what we just determined here this  
14:07:25 25 morning is that these profits are not fraud proceeds,

14:07:30 1 which is why we eliminated that column in the  
14:07:33 2 Garibotti chart, which is why the government hasn't  
14:07:35 3 said --

14:07:36 4 THE COURT: Well, does it even matter if  
14:07:37 5 they are?

14:07:39 6 MR. ROSEN: Well, yeah, because if they're  
14:07:41 7 not -- if they're not, if they're just regular trading  
14:07:45 8 proceeds, they're not proceeds from a victim. They're  
14:07:48 9 not money obtained from that victim. It's just  
14:07:50 10 trading proceeds.

14:07:51 11 THE COURT: So this is I guess the focus  
14:07:54 12 of my question, because I'm getting back to, out of  
14:07:59 13 *Ciminelli* into *Greenlaw*, I guess. I mean, it has to  
14:08:04 14 deprive money or property -- and *Greenlaw* says from  
14:08:06 15 the victim.

14:08:06 16 MR. ROSEN: From the victim. Exactly.

14:08:14 17 THE COURT: And so does any money come  
14:08:15 18 from the victim here? Any victim?

14:08:16 19 MR. ROSEN: I haven't seen or I don't  
14:08:18 20 think it's alleged that anybody obtained a single  
14:08:21 21 dollar from what actually is a true victim. We filed  
14:08:24 22 the materiality brief as part of our response --

14:08:30 23 THE COURT: I mean, one of the things  
14:08:31 24 *Greenlaw* says -- and it's because it was kind of a --  
14:08:35 25 for lack of a better term, a Ponzi scheme, the facts

14:08:40 1 were.

14:08:41 2 MR. ROSEN: Right.

14:08:41 3 THE COURT: Is that by -- the defendant  
14:08:49 4 gaining money, the plaintiff necessarily -- or not  
14:08:51 5 plaintiff, but the victim or investor necessarily lost  
14:08:55 6 money. Is that true here?

14:08:59 7 MR. ROSEN: At the risk of being scolded,  
14:09:02 8 Judge, and I hate quoting yourself back to you, it's  
14:09:04 9 not a zero-sum game. It's just not. This is trading.  
14:09:09 10 Stocks can go up.

14:09:10 11 And so if your -- even if they're -- even  
14:09:13 12 if everything is correct, if a stock goes up and they  
14:09:17 13 sell out, which is what happened in a lot of these  
14:09:20 14 stocks, no one lost anything, as account of what they  
14:09:24 15 did.

14:09:24 16 And that's why it's different from a  
14:09:25 17 traditional Ponzi scheme. And that's why it's exactly  
14:09:28 18 different from a traditional pump and dump. In a  
14:09:30 19 traditional pump and dump, one person's gain is one  
14:09:34 20 person's loss. In a Ponzi scheme, one person's gain  
14:09:36 21 is one person's loss.

14:09:38 22 In an open market, with market trades  
14:09:40 23 going back and forth amongst people, people making all  
14:09:42 24 types of different discretionary economic decisions  
14:09:45 25 and other issues being raised by people, press



14:09:49 1 releases, SEC reports, short sellers, you can't say  
14:09:53 2 that. No one can say that. Which is why  
14:09:59 3 Dr. Garibotti, as Mr. Ford said, for three-quarters of  
14:10:01 4 a million dollars, hasn't been able to say that. It's  
14:10:04 5 futile.

14:10:05 6 So that's why I'm saying, dismiss the  
14:10:05 7 indictment. Let them prove that people, victims,  
14:10:08 8 actually true victims, not people who think that they  
14:10:11 9 are victims, not people who say I lost money in this  
14:10:13 10 stock so therefore I'm a victim, like they're  
14:10:15 11 expecting 1,000 batting average for every stock, which  
14:10:19 12 even my client didn't get, nor did any of the others.  
14:10:21 13 My client lost plenty of money on plenty of tickers  
14:10:25 14 over plenty of months.

14:10:26 15 Let them allege that and let them prove  
14:10:28 16 that in accordance with the law to show that a crime  
14:10:30 17 has been committed. And that's why I'm confident that  
14:10:33 18 once they actually have to do that --

14:10:37 19 THE COURT: And I'll let you finish and  
14:10:40 20 then I'll let anybody else speak and then I'll ask  
14:10:42 21 Mr. Armstrong or someone from the government to  
14:10:43 22 address it, but you keep using the word "prove." And  
14:10:49 23 in a dismissal stage, they don't really have to prove  
14:10:54 24 it, do they? They just have to allege it.

14:10:57 25 MR. ROSEN: They have to allege it, but --

14:10:59 1 THE COURT: That's why the government --  
14:10:59 2 and I don't think it's a secret -- they love that  
14:11:01 3 statement by Mr. Knight.

14:11:05 4 MR. ROSEN: And Mr. Knight has pled guilty  
14:11:07 5 because that was his intent. My client barely knew  
14:11:11 6 Mr. Knight. Mr. Knight talking with people who  
14:11:14 7 generally were not part of this conspiracy. You can't  
14:11:17 8 allege an indictment based on completely inadmissible  
14:11:20 9 evidence. I don't see how it's admissible against my  
14:11:23 10 client, let alone some of these people. So that's  
14:11:27 11 Mr. Knight.

14:11:28 12 And he's taken responsibility for what his  
14:11:31 13 intent was. But my client, I know, did not cause  
14:11:35 14 victims to lose money by what he was doing. It's  
14:11:39 15 provable in the charts.

14:11:40 16 But, more importantly, all I do is I keep  
14:11:42 17 looking back at that indictment. And instead of  
14:11:45 18 saying this victim, because they bought based on X  
14:11:50 19 tweet, they were expecting him to say when he sold.  
14:11:53 20 He didn't say when he sold. They hold onto it because  
14:11:56 21 of that. And then the stock went down because of  
14:11:59 22 that. That they lost money. It doesn't.

14:12:01 23 All it says is that my clients gained  
14:12:05 24 money. But in a nonzero-sum game, that's not enough.  
14:12:09 25 They chose a speaking indictment in this case. That

14:12:12 1 was their decision. And when the allegations in that  
14:12:16 2 indictment -- you can't just track the language, but  
14:12:18 3 when the allegations in that indictment don't add up  
14:12:21 4 to a crime, it has to be dismissed.

14:12:23 5 And here, it's like we're going to be  
14:12:25 6 doing this -- we've gone through, what, five exhibits  
14:12:27 7 today or something like that? Like we're going to be  
14:12:29 8 doing this for months.

14:12:31 9 THE COURT: That's about five times more  
14:12:32 10 than I would have counted.

14:12:34 11 MR. ROSEN: We've gone through, you know,  
14:12:35 12 month -- we're going to be at this for months. And to  
14:12:38 13 do that and then to hear -- either hear evidence or,  
14:12:41 14 you know, get, you know, God forbid a conviction and  
14:12:44 15 then, you know, an appeal and reversal, because what I  
14:12:49 16 think it's on its face is insufficient under the new  
14:12:53 17 *Ciminelli* law, which hadn't been -- which hadn't -- to  
14:12:55 18 their defense, had not been handed down until then as  
14:12:59 19 a valid reasoning in the Second Circuit, amongst other  
14:13:04 20 circuits, I don't fault them for not alleging it.

14:13:06 21 But they have to allege it. And in this  
14:13:07 22 case, it's not simply semantics. I remember -- you  
14:13:10 23 talked about this yesterday of, oh, they'll just go  
14:13:12 24 back and add a paragraph. But it's not that simple.  
14:13:16 25 They have to make allegations in the grand jury and

14:13:18 1 add that to the speaking portion of these victims and  
14:13:20 2 show precisely how they lost money. And they can't do  
14:13:23 3 that.

14:13:25 4 And -- but even if they could, Judge,  
14:13:28 5 based on what we've seen in the evidence, this case  
14:13:31 6 would be so far narrower than what it is now, we won't  
14:13:34 7 be talking about 54 or 397 or 25 or 35. We'll be  
14:13:40 8 talking about two or three. Based on allegations that  
14:13:43 9 we'll contest at trial.

14:13:44 10 But this case will be, you know, drowned  
14:13:48 11 in that proverbial bathtub that people talk about.  
14:13:51 12 And it will allow us to actually try a case rather  
14:13:54 13 than simply going through exhibit after exhibit from  
14:13:57 14 April 1st to June 15th.

14:14:00 15 THE COURT: Okay. Any other defendant  
14:14:02 16 want to weigh in?

14:14:05 17 MR. FORD: I'll just speak very quickly.

14:14:12 18 To my knowledge, during the charged time  
14:14:13 19 period, none of these defendants took a single dollar  
14:14:16 20 from any of their followers or complainants. That in  
14:14:19 21 and of itself can end the conversation.

14:14:27 22 And not only did they not take a single  
14:14:28 23 dollar, it was not their intent to take a single  
14:14:31 24 dollar. The way this works in practice, Your Honor,  
14:14:33 25 is people set up paid chatrooms.

14:14:36 1 They then tell people, hey, I got the best  
14:14:38 2 calls in the world. People give them extraordinary  
14:14:42 3 amounts of money. It's in our exhibits. \$279 a month  
14:14:46 4 and they come in and they tell you, buy Amazon stock  
14:14:48 5 today or buy this stock today. That would be a way to  
14:14:51 6 obtain money from your followers. My client never  
14:14:54 7 asked for and never received a single dollar from  
14:14:57 8 anyone.

14:14:58 9 To put this in the context of *Ciminelli*, I  
14:15:05 10 view the facts, while disparate, as legally identical.  
14:15:11 11 The reason is because, as I discussed yesterday, if we  
14:15:17 12 go back to what actually happens in *Ciminelli* -- and I  
14:15:18 13 know everybody knows the case well, we've been  
14:15:21 14 studying it now for a long time, and studying these  
14:15:24 15 concepts even before *Ciminelli* went to the Supreme  
14:15:27 16 Court. And you can see it in other rulings we've got,  
14:15:29 17 as I mentioned, such as *SEC v. Govil*, where a similar  
14:15:33 18 issue was decided in the SEC context before -- argued  
14:15:38 19 before *Ciminelli*.

14:15:39 20 What happens in that case is there is an  
14:15:44 21 individual paying bribes to New York state officials  
14:15:48 22 for the purpose of using money that's going to go to a  
14:15:53 23 revitalization program for the city of Buffalo. The  
14:15:58 24 government comes and brings a wire fraud claim and the  
14:16:00 25 Supreme Court says wait a second. You knew what it

14:16:04 1 cost. It was going to be \$10 million to build this  
14:16:07 2 new building in Buffalo. That was the bid. Whether  
14:16:09 3 you gave it to company A, B, or C. It was all the  
14:16:13 4 same.

14:16:13 5 What you're upset about is that had you  
14:16:17 6 have known this additional information, that these  
14:16:19 7 guys were paying kickbacks, you would have acted  
14:16:21 8 differently. That's the concept in the non-abstract  
14:16:24 9 form of what is meant by this.

14:16:30 10 Because in the United States we are  
14:16:31 11 talking about only registered securities, there is no  
14:16:33 12 point at which somebody is not cognizant or aware of  
14:16:38 13 the market price of a stock at any given moment in  
14:16:40 14 time. Which means that any of the followers, any of  
14:16:47 15 the complainants who purchased the stock at the bona  
14:16:50 16 fide market price and sold at the bona fide market  
14:16:54 17 price, their sole complaint in this is that they would  
14:16:59 18 have liked to have known when Edward Constantinescu  
14:17:03 19 was selling.

14:17:04 20 And if you look at how much money this man  
14:17:07 21 made on huge stocks like American Airlines and  
14:17:12 22 Carnival Cruise Lines, I, too, wish I knew when he was  
14:17:17 23 pressing the sell button. But it wasn't feasible to  
14:17:20 24 develop an internet following on Twitter by telling  
14:17:22 25 people when he was selling stocks.

14:17:25 1 He tried to find companies, not that he  
14:17:28 2 loved or wanted to marry. He tried to find companies  
14:17:30 3 that he thought society is going for this. Joe Biden,  
14:17:35 4 our President, is getting on the television saying  
14:17:37 5 carbon capture is the future. We're going to put  
14:17:41 6 \$2 trillion into green energy and into carbon capture.

14:17:44 7 And my client's looking at it and saying  
14:17:48 8 Caber Energy is the next new carbon capture company.  
14:17:49 9 They just acquired Viking, who is going to do carbon  
14:17:52 10 capture. I bet this is going to be a good one.

14:17:54 11 And it's not just my client. It's the  
14:17:56 12 U.S. Department of Energy issuing reports on carbon  
14:17:59 13 capture. It is tons of online news articles and  
14:18:04 14 platforms issuing, you know, statements during this,  
14:18:09 15 you know, purported green period where we're going to  
14:18:11 16 change the economy.

14:18:11 17 My client has the foresight and the  
14:18:15 18 brilliance, frankly, to say this stock could go. Not  
14:18:18 19 because he has a political agenda or political motive  
14:18:22 20 or even that he believes that this will be a long-term  
14:18:25 21 success of the company. In his mind, he's saying this  
14:18:28 22 is a good investment in the short term because this is  
14:18:30 23 the flavor of the month.

14:18:32 24 Once he makes that realization, he says  
14:18:35 25 there's something else I can do, which is I can help

14:18:38 1 other people learn how to do this. And so he puts it  
14:18:40 2 on. And he puts it on his website with tweet after  
14:18:46 3 tweet after tweet, giving the rules of the road. I  
14:18:50 4 don't post my sells. I don't post my exits. If  
14:18:52 5 you're not -- if you're unable to make money you paper  
14:18:56 6 trade. Manage your own risk. If the stock is going  
14:18:59 7 up, set a stop loss. If you are coming to me and  
14:19:03 8 saying, hey, should I buy this stock, it's too late.  
14:19:07 9 He tells you that. Don't chase. If the stock has  
14:19:10 10 already gone up.

14:19:11 11 Now, what the government did is they found  
14:19:13 12 a bunch of conversations, which it's ironic where my  
14:19:17 13 client said buy on the dip. Sometimes even seems to,  
14:19:21 14 like, through texting, yell at these other  
14:19:23 15 individuals, what are you guys doing. Make sure --  
14:19:25 16 you know, everything has got to happen on the dip.  
14:19:27 17 What does that mean? Buy low, sell high. It's the  
14:19:32 18 most fundamental economic principle and the foundation  
14:19:34 19 of capitalism, going back to Adam Smith's writing.

14:19:37 20 He's not saying anything extraordinary  
14:19:39 21 here. He's telling them, if you want to be successful  
14:19:42 22 influencers like me, make sure that you are letting  
14:19:44 23 people know when the stock is low. If you tell them  
14:19:48 24 when it's high, they're more likely to lose money.

14:19:51 25 All of this goes back to the *Ciminelli*



14:19:54 1 issue, which is what is his intent. And is his intent  
14:19:58 2 ever to obtain money from people. It's not alleged in  
14:20:01 3 the indictment and it's not a feasible theory, because  
14:20:06 4 he never takes money from anybody. What they are  
14:20:07 5 upset about is they wanted to know how he traded  
14:20:10 6 because they wanted to make millions of dollars and  
14:20:13 7 have fancy cars and women like the one we saw in  
14:20:18 8 Mexico, that's what they wanted.

14:20:20 9 I mean, look, you know, at the time he  
14:20:24 10 went through a divorce and you could hardly blame him.  
14:20:26 11 You know, I have a son, so I might do something  
14:20:28 12 different. But if I made \$50 million on stocks in two  
14:20:31 13 months, even with a son, I'd probably buy a pretty  
14:20:35 14 nice car. You know, but his actions weren't out of  
14:20:37 15 the ordinary, but they were all done lawfully. The  
14:20:40 16 overwhelming majority of his profits were off of  
14:20:43 17 stocks that I can assure you, you will recognize.  
14:20:46 18 They're big names.

14:20:46 19 He made -- you know, for example, right  
14:20:48 20 around this time period, \$4 million. I think in a  
14:20:52 21 day-and-a-half on Tesla stock. He just was good at  
14:20:55 22 this.

14:20:56 23 Under -- what we're asking, and it's on  
14:21:01 24 behalf of the entire group, is for dismissal of the  
14:21:04 25 indictment for failure to allege that any of these

1 individuals ever intended to obtain money from  
2 anybody.

3 Having now sat through --

4 THE COURT: Let me stop you there, because  
5 let me preview what the government's going to say.  
6 The government's going to say we've alleged intent.  
7 And we have Mr. Knight, who we think is a  
8 co-conspirator with you guys, saying we intended to  
9 rob these people.

10 And at least at one point in the  
11 indictment I think there is language that you intended  
12 to maximize your profits, often at the expense of the  
13 victims, is I think the way they say it, but it's  
14 something like that. I'm paraphrasing.

15 MR. FORD: Well --

16 THE COURT: And my question is, isn't that  
17 enough? Or is it not enough?

18 MR. FORD: The answer is no, it's not  
19 enough. And part one of that, with regards to the  
20 fact-specific issue with Dan Knight, I mean, look,  
21 they're not alleging the crime of robbery. So we'll  
22 get that out of our mind.

23 As we've heard, none of these defendants  
24 were in the room. And, in fact, he was speaking to a  
25 different group of people all together. The only

14:22:11 1 individual in the room who is also on this indictment  
14:22:14 2 is Tommy Cooperman, who audibly disagrees with what  
14:22:18 3 Dan Knight is saying and points out that people are  
14:22:20 4 actually making money on GTT.

14:22:22 5 Now, what Dan Knight was talking about, I  
14:22:23 6 don't know. But we did go back and were able to find  
14:22:26 7 on Wayback multiple tweets that we are willing to  
14:22:28 8 share with the Court where Dan Knight uses this  
14:22:32 9 language in regards to the other co-defendants. He  
14:22:35 10 says he's robbing them. He uses it in regards to  
14:22:38 11 hedge funds.

14:22:38 12 These are all factual issues. I don't  
14:22:40 13 know why he was saying what he was saying. But this  
14:22:44 14 bleeds into the second part of your question, which is  
14:22:47 15 the theory itself is not tenable, either in the  
14:22:52 16 indictment or otherwise as alleged. Even if they say  
14:22:57 17 at the expense of, it is insufficient to show an  
14:23:02 18 intent to obtain money or property from them because  
14:23:06 19 they can't. It is not feasible. The marketplace  
14:23:10 20 doesn't operate that way. At all times all buys and  
14:23:14 21 sells were bona fide and at the prevailing market  
14:23:19 22 rates.

14:23:19 23 The only thing that the government is  
14:23:24 24 alleging was at the expense of was the lack of  
14:23:27 25 information regarding when these very successful men

14:23:30 1 sold their stocks. Because they wanted to be like  
14:23:33 2 them and they wanted to make as much money.

14:23:36 3 We tried give them the rules of the road.  
14:23:38 4 Our clients tried to give them the rules of the road  
14:23:41 5 in the tweets. They did what they could. But at the  
14:23:45 6 end of the day, even if the government is making some  
14:23:49 7 suggestion that, you know, there was -- you know,  
14:23:56 8 deprivation of information, which is what they were  
14:23:58 9 saying, they have failed to allege that. And so it is  
14:24:04 10 why we're seeking dismissal of this case.

14:24:08 11 THE COURT: Mr. Reyes?

14:24:10 12 MR. REYES: Your Honor, I'll be brief.

14:24:19 13 This has been an exercise in putting a  
14:24:22 14 square peg in a round hole since the beginning. And  
14:24:26 15 what Mr. Rosen said is absolutely true.

14:24:28 16 First of all, in a traditional pump and  
14:24:30 17 dump -- and Mr. Ford -- in a traditional pump and  
14:24:36 18 dump, the victim, as soon as they buy, they're buying  
14:24:41 19 something that's not worth what it's said to be worth.  
14:24:45 20 The stock has been manipulated.

14:24:47 21 That's absolutely not the case in this  
14:24:50 22 matter and it hasn't -- and the prosecution has said  
14:24:53 23 that they are not going to try and show causation.

14:24:57 24 If you can't show the causation that the  
14:25:00 25 stock price was somehow manipulated, then the buyers,

14:25:05 1 when they bought a \$4 stock, it was worth \$4. They  
14:25:09 2 had a certificate that said it's worth \$4. What they  
14:25:12 3 did after that -- and, of course, a lot of market  
14:25:15 4 influences -- is not the defendants' responsibility.

14:25:21 5 Now, I will say this, Your Honor. To the  
14:25:25 6 extent that they're alleging a causation argument --  
14:25:29 7 excuse me -- they are saying they're not, but they  
14:25:32 8 kind of are, it changes the dynamics of this case  
14:25:36 9 tremendously. Because it is hand in hand with  
14:25:40 10 deprivation. If they're not going to show causation  
14:25:42 11 and the stock price was the stock price, then they  
14:25:46 12 can't show a deprivation.

14:25:47 13 So I just wanted to emphasize that for the  
14:25:50 14 Court.

14:25:51 15 I will also say this: The traditional  
14:25:56 16 pump and dump is a scenario where the perpetrators  
14:26:01 17 don't really engage in a lot of risk. It's  
14:26:03 18 manipulation. That is absolutely not the case with  
14:26:07 19 our guys. Every time they woke up in the morning and  
14:26:09 20 read the news and made their decisions, they were  
14:26:11 21 engaging in the same amount of risk as anyone on the  
14:26:13 22 risk.

14:26:13 23 They didn't sell to anyone directly. It's  
14:26:15 24 not the wolf of Wall Street where they're on the phone  
14:26:18 25 selling to the victims. It was the market. And the

14:26:22 1 individuals who bought this stock had not -- were not  
14:26:24 2 deprived of anything. It was worth \$4. They could  
14:26:27 3 give it to someone else, it was worth \$4 then. And  
14:26:30 4 the deprivation of property did not occur. Not as a  
14:26:33 5 result of any manipulation, which they've abandoned.

14:26:37 6 So I just wanted to emphasize that for the  
14:26:39 7 Court.

14:26:39 8 We'd also join the defendants and say the  
14:26:43 9 proper route here would be to dismiss this -- because  
14:26:47 10 it is a defective indictment -- and avoid having to go  
14:26:51 11 through a whole long trial only to be back here some  
14:26:55 12 time later.

14:26:56 13 Thank you, Your Honor.

14:26:58 14 THE COURT: All right. Any other  
14:26:59 15 defendant want to weigh in?

14:27:02 16 Mr. Armstrong, you want to answer that?

14:27:05 17 MR. ARMSTRONG: Sure, Your Honor.

14:27:07 18 Your Honor, can you please tell me how  
14:27:08 19 want me to proceed? I'm happy to just talk -- if you  
14:27:12 20 ask specific questions, I'm happy to answer those as  
14:27:12 21 well, so --

14:27:15 22 THE COURT: Yeah. Well --

14:27:15 23 MR. ARMSTRONG: Yeah. What's up?

14:27:16 24 THE COURT: -- here's the part I'm most  
14:27:19 25 interested in.

14:27:20 1 Yesterday I think it was me that said  
14:27:26 2 isn't it true that whatever these defendants did or  
14:27:29 3 didn't do, if they'd have done it and stayed off  
14:27:34 4 social media, they'd have been okay. And I think your  
14:27:37 5 answer was yes.

14:27:39 6 And so if that's the case, what they're  
14:27:45 7 really being prosecuted for is the combination of  
14:27:52 8 statements they made, which the government, perhaps  
14:27:59 9 justifiably, thinks were not totally truthful, but the  
14:28:05 10 real thing they're being prosecuted is statements they  
14:28:08 11 didn't make like, oh, by the way we're selling.

14:28:13 12 And how is that different from *Ciminelli*?  
14:28:16 13 I mean, that's what I'm -- I mean, *Ciminelli* says,  
14:28:20 14 lack of information -- again, I'm paraphrasing the  
14:28:24 15 Supreme Court here -- but lack of information is not a  
14:28:26 16 property right. And as such, it's not actionable  
14:28:30 17 under securities fraud or wire fraud, either one.

14:28:34 18 MR. ARMSTRONG: Okay. So a few things,  
14:28:34 19 Your Honor.

14:28:35 20 Number one, we would push back on the  
14:28:38 21 contention that this is an omissions case. That's not  
14:28:42 22 what we have alleged. In paragraph 13 of the  
14:28:49 23 indictment, of the superseding indictment, we talk  
14:28:51 24 about -- at length about how the defendants hoisted  
14:28:56 25 upon their followers a whole bunch of false and

misleading information and false and misleading tweets. And we categorize them.

THE COURT: And deceit is half the equation. I agree.

MR. ARMSTRONG: Yes.

THE COURT: It's the other half I'm worried about.

MR. ARMSTRONG: Yeah. And so just the idea that this is an omissions case, is just flatly contradicted by, number one, the allegations in the superseding indictment, but, number two, what our trial proof is going to be as well. So that's number one.

Number two is that -- I think Your Honor knows this, this is Black Letter Law -- allegations in an indictment have to be taken as true. And we allege to the hilt in 35-plus pages how the defendants used false and misleading information to fraudulently induce others to buy stocks at their detriment.

And so the crux of *Ciminelli* is that intent. That deceptive intent to obtain money or property. And there is no doubt that that was their intent. They wanted other people to depart with their money and buy a stock so they could then benefit.

THE COURT: What do I do with *Greenlaw*



14:30:13 1 that says money or property from the victim?

14:30:18 2 MR. ARMSTRONG: So I think that we have  
14:30:20 3 that also alleged in the indictment. It's the  
14:30:23 4 followers issue. I think that we put as part of our  
14:30:27 5 jury instruction that it doesn't have to be a specific  
14:30:29 6 person. There has to be a victim contemplated. And  
14:30:32 7 we allege that there a victim contemplated here. In  
14:30:36 8 this case, as we allege and as we're going to prove,  
14:30:38 9 the contemplated victim is the followers.

14:30:47 10 THE COURT: Does it matter that some of  
14:30:48 11 the followers made money?

14:30:51 12 MR. ARMSTRONG: Again, Your Honor, where  
14:30:52 13 are we in the case? We are looking at the indictment  
14:30:57 14 as alleged is true. And you cannot go beyond the four  
14:31:00 15 corners of the indictment on the motion to dismiss  
14:31:04 16 stage. There is no summary judgment.

14:31:05 17 THE COURT: I'm with you on that. I'm  
14:31:06 18 with you on that. That's one of the reasons I was  
14:31:07 19 asking Mr. Rosen what I was asking.

14:31:10 20 But doesn't -- I guess -- and I guess I'm  
14:31:17 21 going to repeat myself here. How do I get away from  
14:31:21 22 the fact that this whole case is about the conveyance  
14:31:26 23 or non-conveyance of information and how does that  
14:31:32 24 differ from what *Ciminelli* was about? I mean,  
14:31:35 25 *Ciminelli*, they had a fraud and kickback scheme going

14:31:39 1 and they didn't tell anybody about it.

14:31:42 2 MR. ARMSTRONG: Yeah, Your Honor, I don't  
14:31:43 3 pretend to have a monopoly on all the answers, and so  
14:31:46 4 I think Mr. Liolos has something he wants to add,  
14:31:49 5 so...

14:31:49 6 THE COURT: Well, you can add. I'm  
14:31:49 7 willing to hear from anybody.

14:31:49 8 MR. LIOLOS: Thank you, Judge.  
14:31:50 9 Yeah. In *Ciminelli*, they were trying to  
14:31:52 10 get them to give them the contract. Here, they're  
14:31:56 11 trying to get them to buy the shares to get the money,  
14:31:58 12 right. So *Ciminelli* is a contract for labor. It's  
14:32:01 13 not cash coming out of their brokerage accounts. And  
14:32:05 14 it's the intent, over and over again, as alleged in  
14:32:08 15 the indictment, that they were trying to induce people  
14:32:09 16 to part with their money to their detriment.

14:32:13 17 THE COURT: The people that were departing  
14:32:14 18 with money in *Ciminelli* were the State of New York,  
14:32:18 19 that rebuilding program. The real victims in  
14:32:21 20 *Ciminelli* were, I mean, if you're asking me to analyze  
14:32:25 21 it, would be the other bidders that didn't pay the  
14:32:28 22 kickback that didn't have a chance of getting the  
14:32:32 23 contract because they didn't pay the kickback.

14:32:36 24 MR. LIOLOS: Indeed. And it was inducing  
14:32:37 25 them to depart with the contract, not with their cash

14:32:40 1 as the followers were here.

14:32:43 2 The intent of the post was to induce  
14:32:46 3 people to depart with their money. To buy the shares  
14:32:49 4 to the detriment of the followers and the benefit of  
14:32:52 5 the defendants. That's what we've alleged.

14:32:54 6 And it's also helpful context that  
14:32:57 7 *Ciminelli* went all the way through trial. And the  
14:33:01 8 government, the entire time only relied on a right to  
14:33:03 9 control theory all the way through its trial evidence  
14:33:05 10 as well.

14:33:06 11 So while we're just looking at the four  
14:33:08 12 corners of the indictment, I expect that if this was  
14:33:10 13 in a similar posture of *Ciminelli*, it would be  
14:33:13 14 significantly expanded by the trial evidence here.

14:33:19 15 THE COURT: Well, what -- help me there in  
14:33:20 16 *Greenlaw* then, which obviously it's Fifth Circuit  
14:33:24 17 case, I'm bound by it. The reason they found or were  
14:33:32 18 looking at the loss from the victim in terms of the  
14:33:37 19 gains from the defendant was because it was, as I  
14:33:41 20 called it yesterday, a zero-sum game or whatever. I  
14:33:44 21 think the Fifth Circuit said it was the flip side of  
14:33:48 22 the same coin; that, you know, for you to gain a  
14:33:52 23 dollar, I had to lose a dollar.

14:33:56 24 But that's not true here, is it?

14:33:58 25 MR. ARMSTRONG: So, Your Honor, I think

14:33:59 1 that -- to Mr. Liolos's point, we have a government  
14:34:02 2 exhibit from Mr. Matlock's own words that says just  
14:34:05 3 that. And we're happy to pull it up and show Your  
14:34:08 4 Honor.

14:34:08 5 THE COURT: Just tell me what it says.

14:34:10 6 MR. ARMSTRONG: Ms. Kim, if you could  
14:34:12 7 please pull up Government Exhibit 146, please.

14:34:34 8 This is a post from Mr. Matlock on the  
14:34:36 9 Atlas Trading Discord floor in the heart of the  
14:34:39 10 conspiracy. The last line is most critical one on  
14:34:41 11 October 21, 2021, he says: One other thing where do  
14:34:46 12 you think the money you make trading comes from? It  
14:34:48 13 doesn't just come from nowhere. Doesn't matter if  
14:34:51 14 you're trading Tesla or CEI. If you made a single  
14:34:55 15 dollar, it came from someone else's trading account.

14:34:58 16 So that is a zero-sum game in the trial  
14:35:01 17 evidence and in Mr. Matlock's own words.

14:35:07 18 MR. REYES: Your Honor, may I address  
14:35:08 19 that?

14:35:08 20 THE COURT: Wait till he's done.

14:35:11 21 MR. REYES: Sorry. Go ahead.

14:35:11 22 MR. ARMSTRONG: And so I think that that  
14:35:12 23 should alleviate Your Honor's concerns that when we  
14:35:14 24 allege that they were fraudulently inducing people to  
14:35:17 25 part with their money or property, by buying stocks,

14:35:20 1 they were doing it, number one, to benefit themselves.  
14:35:24 2 And they were doing it, number two, in a zero-sum game  
14:35:27 3 that Mr. Matlock describes in his own words during the  
14:35:31 4 conspiracy.

14:35:31 5 THE COURT: Okay. Now you can speak.

14:35:33 6 MR. REYES: Thank you, Your Honor.

14:35:33 7 Your Honor, what he's describing there is  
14:35:35 8 how the stock market works. This is the same if it's  
14:35:39 9 IBM or Amazon or Whole Foods.

14:35:44 10 At the end of the day, if you have -- if  
14:35:46 11 you sell something and you get money, it comes from  
14:35:49 12 somewhere. There's a finite amount of stock and a  
14:35:52 13 finite amount of money. He's not saying the person --

14:35:54 14 THE COURT: Whose side are you on?

14:35:58 15 MR. REYES: No, no. But here, let me  
14:35:59 16 finish. He's not saying that the person doesn't get  
14:36:01 17 something in return for buying the stock. It does  
14:36:04 18 come from somebody's account, not directly to  
14:36:06 19 Mr. Matlock. There's a whole middle ground. But the  
14:36:10 20 market works itself out if you sell something and it's  
14:36:12 21 bought. But the person who buys the stock gets the  
14:36:17 22 price of oil for that amount. And that stock could  
14:36:22 23 very well go up.

14:36:23 24 If you take this to its logical  
14:36:26 25 conclusion, then anyone who ever buys a stock and then

14:36:28 1 sells it is taking money from someone's account, and  
14:36:31 2 that's actually true, right. I mean, it's a finite  
14:36:34 3 amount of stock. But you're not taking it, you're  
14:36:37 4 buying it. They're getting something in return. And  
14:36:40 5 they're getting the stock. A stock that, in many  
14:36:42 6 cases in these cases, for example, go straight up.

14:36:44 7 So Mr. Matlock was simply illustrating the  
14:36:51 8 fact that when you buy something in the market, that's  
14:36:52 9 a finite amount of shares, anyone who has ever traded  
14:36:55 10 on the stock exchange, in order to leave the market  
14:36:58 11 with more money, it came from somewhere. But that  
14:37:03 12 somewhere receives something in return. Equity. And  
14:37:06 13 that equity could rise in value or go down in value.

14:37:09 14 So this is not a statement of anything  
14:37:11 15 nefarious whatsoever. And it certainly doesn't have  
14:37:14 16 anything to do with intent.

14:37:18 17 THE COURT: Mr. Rosen, you're standing  
14:37:21 18 there. Find a microphone.

14:37:23 19 MR. ROSEN: I just keep going through the  
14:37:26 20 indictment. And I just fail to see where they allege  
14:37:30 21 that money and property came from the victim. It  
14:37:33 22 doesn't say --

14:37:34 23 MR. LIOLOS: Paragraph 12.

14:37:35 24 MR. ROSEN: It doesn't say it in the  
14:37:37 25 charge. It doesn't give any specific examples. The

14:37:40 1 purpose of the scheme is laid out as part of the  
14:37:42 2 conspiracy, that it's a scheme to enrich themselves  
14:37:46 3 and not to obtain -- there's nothing about obtaining  
14:37:48 4 money from a victim or anything like that.

14:37:51 5 And I think what -- you know, what  
14:37:53 6 Mr. Armstrong pointed out to is exactly what happened.  
14:37:57 7 Is that people understand that in the stock market  
14:38:00 8 you're obviously getting money from someone. But  
14:38:02 9 that's not illegal. The illegality is from the  
14:38:05 10 victim.

14:38:06 11 Greenlaw was about money obtained from  
14:38:08 12 a -- directly as a result of a private placement  
14:38:11 13 memorandum. Victims were giving money directly to  
14:38:16 14 the -- to the defendants. That's obviously a scheme  
14:38:19 15 to obtain money and property from a victim by means of  
14:38:21 16 fraud.

14:38:22 17 The stock market, where we have no proof  
14:38:25 18 that there was any artificial inflation of anything,  
14:38:27 19 and Dr. Garibotti can't even say a single dollar arose  
14:38:31 20 from fraud, that obviously did not happen. It's  
14:38:34 21 simply counterparties trading in a national market.  
14:38:38 22 The defendants made money. But who cares. That's not  
14:38:40 23 the issue. Enriching themselves is not the issue.

14:38:43 24 The issue has to be obtaining money and  
14:38:44 25 property from the victim. And there is no out --

specific allegations at all in this indictment. And the government is not prejudiced. They can go -- we're not asking them to dismiss with prejudice.

They can go back and reallege it. We can narrow this case significantly and we can proceed if they find the proof. If they can allege and find these victims, these, you know, we believe are unicorns but they believe are everyday people, we'll have a battle over that.

But we need that battle. We can't just have it over money and property. It doesn't matter that they obtained money and property. It has to come from that victim.

MR. ARMSTRONG: Again, Your Honor, these are fantastic arguments that go to maybe the weight of the evidence. It goes to maybe are the allegations true or not. Maybe is there a counterargument you could make. Sure.

But at the stage that we're at now, where we have alleged that they did this in paragraph 12 at the expense of their followers, and we have the specific allegations that they were robbing idiots for their money, those allegations have to be taken as true at this stage. And we're going to back it up with other trial evidence. We're going to back it up



14:39:53 1 with tons of trial evidence that I hope we can show  
14:39:56 2 Your Honor and then show the jury, because it is  
14:39:58 3 compelling and it is powerful and it proves all of the  
14:40:00 4 points that we're talking about today.

14:40:02 5 MR. FORD: Your Honor, if I may. On  
14:40:04 6 *Greenlaw* -- which I talked about *Ciminelli* and how  
14:40:08 7 elucidating the facts are here.

14:40:13 8 In *Greenlaw*, those individuals were  
14:40:15 9 issuing what are called private placement memorandum  
14:40:19 10 or offering memorandum. It is when insiders of a  
14:40:21 11 company accept money in exchange for an ownership  
14:40:23 12 interest of that entity. It can be a limited  
14:40:26 13 partnership, it could be an LLC, or it could come in  
14:40:30 14 the form of stock.

14:40:34 15 So the reason that the Fifth Circuit  
14:40:34 16 reaches the conclusion that it does in *Greenlaw* is  
14:40:37 17 because those individuals were, through their  
14:40:39 18 misleading or deceptive statements, actually obtaining  
14:40:42 19 money in exchange for partnership interest in the five  
14:40:46 20 partnerships.

14:40:46 21 Again, those facts are absent from the  
14:40:49 22 indictment as allegations. They're absent from the  
14:40:52 23 facts or the showing. They do not fit the paradigm  
14:40:56 24 that they are purporting to allege, which is you  
14:40:58 25 didn't disclose when you sold and people would have

14:41:00 1 liked to have known that because they would have sold  
14:41:02 2 as well.

14:41:03 3 To the contrary. We're reiterating what  
14:41:08 4 Mr. Reyes pointed out. Everything was purchased at  
14:41:11 5 bona fide market price. Everything was sold at bona  
14:41:15 6 fide market price through an anonymous market  
14:41:19 7 mechanism.

14:41:24 8 We can discuss the issue further. While  
14:41:29 9 there may be a disagreement among the group as to  
14:41:32 10 whether dismissal with prejudice or without prejudice  
14:41:35 11 is appropriate. If Your Honor is inclined to ask  
14:41:39 12 questions about it, we will answer from our  
14:41:43 13 perspective and where we're sitting.

14:41:45 14 There's no evidence in these 330 exhibits  
14:41:47 15 and there's nothing alleged in the indictment that  
14:41:50 16 Mr. Constantinescu ever took a dollar from anybody.  
14:41:55 17 So it seems like a futile endeavor. But we do  
14:42:00 18 understand dismissal is the right remedy here.

14:42:05 19 Referring to me, personally, I dealt with  
14:42:07 20 it in the *Govil* case. And in that case, the Court --  
14:42:11 21 the Second Circuit found, in no uncertain terms, that  
14:42:15 22 my client in that case had lied, but there weren't  
14:42:19 23 victims because there wasn't a finding that they had,  
14:42:22 24 you know, actually lost money.

14:42:24 25 But, again, we were in the context of an

14:42:25 1 offering memorandum where the money went directly to  
14:42:29 2 the individual. It had nothing to do with private  
14:42:32 3 placement.

14:42:32 4 With regard to the *Nordlicht* case,  
14:42:38 5 *Nordlicht*, N-O-R-D-L-I-C-H-T, which Mr. Rosen  
14:42:40 6 referenced, I also happen to represent the chief  
14:42:42 7 financial officer, Joe Sanfilippo, who was acquitted  
14:42:46 8 on all charges.

14:42:46 9 What happened and what Judge Cogan, who is  
14:42:50 10 really one of the finest judges in the Eastern  
14:42:53 11 District, what happened is we wound up spending -- it  
14:42:55 12 was a three-month long trial only to get a directed  
14:42:58 13 verdict at the end. It went up to the Second Circuit  
14:43:02 14 on appeal. It bounced back and forth. My client was  
14:43:04 15 acquitted, Mr. Levy was not.

14:43:07 16 But at the end of the day, when it came to  
14:43:10 17 sentencing for Mr. Levy, Judge Cogan found there was  
14:43:14 18 no harm or loss and he was sentenced to a nominal  
14:43:18 19 fine. And that's where things stand with that case.  
14:43:20 20 It's up on appeal. It started back in, you know,  
14:43:23 21 2017, I believe.

14:43:24 22 So we've seen this happen with courts.  
14:43:28 23 This is an instance of overreaching by the government.  
14:43:32 24 It's something that was raised by Ms. Cordova very  
14:43:34 25 early on. The Supreme Court of the United States has

14:43:37 1 become sensitized to it. The Second Circuit, who led  
14:43:40 2 the charge and invented the right to control theory,  
14:43:42 3 has backed off of it. The Fifth Circuit in *Greenlaw*  
14:43:45 4 has identified it.

14:43:46 5 And we are now here at risk of spending  
14:43:49 6 months of our lives on a trial that is a dead end.  
14:43:52 7 This indictment as it stands, the allegations are  
14:43:55 8 insufficient. It needs to be dismissed.

14:44:02 9 MR. WILLIAMS: I'd like to briefly speak  
14:44:04 10 to the indictment.

14:44:05 11 Judge, the indictment does not try to  
14:44:07 12 trace money from any victim to any defendant. It  
14:44:09 13 doesn't allege it, it doesn't try it. And a quote in  
14:44:12 14 an indictment cannot substitute for an actual  
14:44:14 15 allegation. They have to say the magic words and this  
14:44:17 16 indictment fails to do that. So it's defective.

14:44:20 17 THE COURT: Did they profit from the  
14:44:22 18 expense of their followers or victims? That's not  
14:44:27 19 saying they got money from their --

14:44:31 20 MR. WILLIAMS: I don't believe so, Your  
14:44:32 21 Honor. I believe the indictment is defective on its  
14:44:34 22 face. And they have to go back to a grand jury and a  
14:44:36 23 grand jury may ultimately find probable cause to that,  
14:44:40 24 but that's not an appropriate consideration today as  
14:44:42 25 to whether this particular indictment is defective.

14:44:45 1 It doesn't even try to trace and say that these people  
14:44:48 2 lost money because of these acts. And that's the key  
14:44:52 3 element that's missing under the case law Your Honor's  
14:44:55 4 been discussing.

14:44:56 5 They have to say the magic words and they  
14:44:58 6 just haven't done it, so it's defective and should be  
14:45:01 7 dismissed. That's all I have.

14:45:03 8 THE COURT: All right, counselors. Let me  
14:45:06 9 tell you what I'm going to do here, since we made so  
14:45:09 10 much progress this morning.

14:45:11 11 I'm going to do one of two things: I'm  
14:45:15 12 going to go back and draft an order dismissing the  
14:45:20 13 case; or I'm going to go back and draft an order on  
14:45:23 14 optional completeness and how we're going to handle  
14:45:26 15 all the social media posts and try to get it out this  
14:45:30 16 afternoon.

14:45:31 17 Obviously, if it's the latter of the two,  
14:45:34 18 I expect you guys here at 9:00 in the morning. If  
14:45:37 19 it's the former, I don't expect you here at 9:00 in  
14:45:41 20 the morning. And I cannot promise you what time I  
14:45:48 21 will get that out.

14:45:51 22 But having said I'll do one of those two  
14:45:54 23 things, I'm not going to get you a copy of what I  
14:45:56 24 think the charge is going to be today because I'm  
14:45:58 25 going to be busy doing that.

14:46:01 1 All right. We'll stand adjourned. Thank  
14:46:03 2 y'all.

3 (Court in recess.)  
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**CERTIFICATE**

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I hereby certify that pursuant to Title  
28, Section 753 United States Code, the foregoing is a  
true and correct transcript of the stenographically  
reported proceedings in the above matter.

Certified on March 21, 2024.

/s/ Nichole Forrest  
Nichole Forrest, RDR, CRR, CRC

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